1990

Alta Industries v. Lynn P. Hurst : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

ALTA INDUSTRIES LTD., a Utah limited partnership, dba STEELCO, and ALTA INDUSTRIES - UTAH, INC., a Utah corporation, in its capacity as general partner of Alta Industries Ltd., Plaintiffs, Appellees, and Cross-Appellants, vs. LYNN P. HURST and WASATCH STEEL INC., a Utah corporation, Defendants, Appellants, and Cross-Appellees.	Supreme Court No. 900612 Priority No. 16

BRIEF OF APPELLEES AND CROSS-APPELLANTS

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
The Honorable Leonard H. Russon, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTION

The Supreme Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The issues presented by defendants and appellants for review are as follows:

1. Whether a certain settlement agreement between plaintiffs and a third party, Volma Heaton, bars plaintiffs' claims against defendants.

2. Whether plaintiffs' claims for conversion and fraud are barred in whole or in part by the Statute of Limitations.

3. Whether the court's findings of fraud and conspiracy are supported by clear and convincing evidence.

4. Whether the finding of conversion is supported by the evidence.

5. Whether the damages awarded were excessive.

With very limited exceptions, all of the issues presented by defendants-appellants on appeal are issues of fact and, accordingly, the appropriate standard of review is the clearly erroneous rule. Rule 52(a), Utah Rules of Civil Procedure; Copper State Leasing Co. v. Black Appliance & Furniture, 770 P.2d 88, 93 (Utah 1988). To the limited extent that appellants' issues entail legal issues, the standard of review is correctness. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988).

The issues presented by plaintiffs and appellees under their cross-appeal are as follows:

1. Did the district court erroneously dismiss Count VI of the Amended Complaint by ruling that to state a claim under the Utah Racketeering Enterprises Act, the claimant must demonstrate three separate

episodes of unlawful activity that involve separate and distinct victims rather than merely showing three separate episodes of unlawful activity that may involve only one victim?

2. Did the district court erroneously dismiss Count VII of the Amended Complaint under the receiving used or secondhand stolen property statute by ruling that even though Wasatch Steel Inc. is a party dealing in used personal property, nevertheless the statute does not cover a business such as Wasatch Steel Inc. and its activities.

Both of these are exclusively issues of law, for which the standard of review is correctness. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988).

THE DETERMINATIVE STATUTES RELEVANT TO THE CROSS-APPEAL ARE AS FOLLOWS:

With respect to the Racketeering Enterprises Act claim, Utah Code Ann. §76-10-1602(2):

> (2) "Pattern of unlawful activity" means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. * * *

With respect to the receiving stolen property statute, Utah Code Ann. §76-6-408(2)(d), which defines the class of persons liable under Section 76-6-412(2):

> (d) Is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee or representative of the pawnbroker or person who buys, receives or obtains property. . . .

STATEMENT OF THE CASE

Nature of the Case. Plaintiffs sought recovery from defendants upon multiple theories based upon (i) defendants' knowing purchase at bargain prices of on the order of 100 loads of steel products stolen from plaintiffs and (ii) defendants' payment of bribes and kickbacks to plaintiffs' employees to induce them to inflate the prices that plaintiffs paid to defendants for steel products purchased from defendants.

Course of Proceedings and Disposition. Plaintiffs initiated this action by filing their Complaint on April 11, 1989. The case was tried to the Honorable Leonard H. Russon, sitting without a jury, between September 25 and October 2, 1990. The district court found for plaintiffs and against defendants on plaintiffs' theories of fraud, conspiracy, conversion, and punitive damages, but dismissed plaintiffs' claims under the Racketeering Enterprises Act and the receiving stolen property statute. The Court entered and filed its Findings of Fact,

Conclusions of Law, and Judgment on December 3, 1990. Defendants filed their Notice of Appeal on December 20, 1990. Plaintiffs filed their Notice of Cross-Appeal on December 24, 1990.

Statement of Facts. Appellants object to appellees' failure to marshal the evidence supporting the district court's findings, failure to cite to the record, and inaccurate statements of what the record shows. Because appellees are dissatisfied with the statement of facts of appellants, appellees offer their own statement of facts.

Plaintiff Alta Industries Ltd. is a Utah limited partnership that does business under the name of "Steelco." Throughout trial, plaintiff was identified as "Steelco" and the same reference will be used for the remainder of this brief. Steelco is in the business of selling and fabricating new steel products. [R450 at 117.]

Wasatch Steel Inc. ("Wasatch Steel") is also in the steel business. It buys and sells both new and used steel products. [R450 at 35-36.] The capital stock of Wasatch Steel is owned 70% by Bill Holtman, 15% by his son-in-law, Lynn P. Hurst ("Hurst"), and 15% by his daughter, Teresa Thompson. [Exhibit 51-P; R454 at 31.] At all material times, Holtman, Hurst, and Thompson comprised all of the directors and officers of Wasatch Steel. Hurst was at all material times the Vice President and General Manager of Wasatch Steel. [R450 at 32-33.] For convenience, Wasatch

Steel and Hurst will sometimes be collectively referred to as "defendants."

In this action, Steelco sought to recover from both Wasatch Steel and Hurst the damages that it suffered because of two discrete kinds of misconduct: First, Wasatch Steel over a period of years knowingly purchased at bargain prices on the order of a hundred loads of steel that had been stolen from Steelco by Volma Heaton, who was then an employee of Steelco. Second, on multiple occasions, Wasatch Steel and Hurst paid bribes and kickbacks to two employees of Steelco, Volma Heaton and Chris Williams, to induce them to cause Steelco to pay fraudulently inflated prices for steel that Wasatch Steel sold to Steelco. Volma Heaton was employed as processing supervisor until 1985 and thereafter as plant superintendent at Steelco and Chris Williams was employed in Steelco's purchasing department. [R450 at 194-95; R451 at 143-44.] Both were fired when the first hint of their improper activity became known to Steelco. [R450 at 137; R452 at 122-24.] What follows is a substantially chronological description of the events that give rise to this action.

Between 1983 and 1987, Volma Heaton stole a huge amount of steel product from Steelco and resold that product to Wasatch Steel at bargain prices. [R450 at 204-05.] At trial, three kinds of steel were discussed -- (i) new steel, (ii) remnant, and (iii) scrap. Wasatch Steel's brief uses the inaccurate term

"cuttings" misleadingly to suggest that the remnant steel stolen by Heaton and sold to Wasatch Steel was basically junk of insignificant value. The term "cuttings" was used in passing at trial only once or twice -- the term "remnant" was almost universally used by both Heaton and Hurst to describe the kind of steel that was stolen and sold to Wasatch Steel. [E.g., R450 at 39-40, 65-66; R454 at 134-35 (Hurst); R450 at 203; R451 at 74, 118 (Heaton).] "New steel" is brand new steel, fresh from the mill, in stock sizes generated by the mill. Remnant steel, on the other hand, is created when a piece of new steel in a stock size is cut for any purpose leaving as a "remnant" a piece of steel that is still new and still large enough to be useful in Steelco's operation of fabricating steel for its customers. [R336 ¶7; R450 at 117-20; R451 at 117-20.] "Scrap," on the other hand, is basically junk steel that is not reuseable but has value only for remelting. Scrap steel may be either pieces of new steel that are too tiny to be reasonably used for other purposes or fabricated, bent up, or rusted out steel that is not salable as new steel because of its fabricated or rusted, used characteristics. [R336 ¶7.]

Steelco does not just sell new steel in stock sizes. Steelco also cuts new steel into sizes and shapes and fabricates by bending or the like steel into shapes, all as requested by its customers. In this process, Steelco generates two by-products --

remnant and scrap. Steelco treated remnant steel and scrap steel very differently. Volma Heaton and Steelco's other employees were directed to reuse the remnant steel generated in Steelco's operation to the maximum extent. [R450 at 121-23.] The remnant material was placed in special racks within Steelco's fabricating area for reuse; scrap, on the other hand, was deposited in "scrap tubs" for future sale to a scrap dealer. [R450 at 118.] The remnant material was worth as much to Steelco as new steel -- the pieces were just smaller. [R452 at 169-70.] If Steelco was requested to sell to a customer half a sheet of steel or half a steel beam or the like, and a remnant of that size existed, Steelco sold the remnant for the same price it would have charged for new steel.

According to both Volma Heaton and Hurst, the material that Heaton sold to Wasatch Steel was almost exclusively remnant, not scrap. [R450 at 39-41; R450 at 202-03; R451 at 74-75, 117.] Heaton specifically testified that all of the stolen steel for which recovery is sought in this case was remnant steel. [R450 at 202-03.] Heaton sold scrap to Wasatch Metal, not Wasatch Steel. [R451 at 117.] Wasatch Metal was a company dealing in scrap steel which was located near Wasatch Steel and was owned by Jack Holtman, who is the brother of Bill Holtman (the 70% owner of Wasatch Steel). [R450 at 60.]

All of the steel that was delivered by Volma Heaton to Wasatch Steel for which Steelco was awarded damages was owned by Steelco and stolen from Steelco -- Volma Heaton himself admitted that he stole the steel. [R450 at 202-05.] Heaton stole the steel after hours and went to great lengths to conceal his thefts from his employer, Steelco. Heaton knew that Steelco required that the usual paperwork be prepared for employees' purchases of steel for their own use, but he did not prepare such paperwork for the stolen steel. [R450 at 195-96.] Instead, if other Steelco employees became aware that he was removing steel from Steelco's premises, Heaton created phony paperwork which was aimed at leading other Steelco employees to believe that he was purchasing the steel and thereafter the paperwork was destroyed. [R450 at 203-04.]

As the Court found, Hurst and Wasatch Steel knew that the steel that Heaton was delivering had been stolen from Steelco. [R338 ¶13.] Hurst's and Heaton's dealings continued on a frequent basis for in excess of four years. [R450 at 68-70.] Volma Heaton told Hurst on multiple occasions -- 20 to 25 -- that Heaton's deliveries to Wasatch Steel were to be kept secret. [R451 at 7-8.] In response, Hurst agreed not to tell anyone at Steelco about Heaton's deliveries. [R451 at 8.] By Hurst's own admission, even though he knew that all of the steel was coming from Steelco and even though he dealt with Heaton consistently

and frequently over a four-plus year period, Hurst never happened to mention to anyone at Steelco that Heaton was selling steel to him or was being paid for the steel, Hurst always asked to deal with Heaton at Steelco, Hurst dealt only with Heaton at Steelco, and Hurst never paid Heaton on Steelco's premises. [R450 at 68-70; R454 at 143-44.] All of Hurst's thirty-odd meetings with Heaton at Steelco's premises were clandestine -- Hurst never announced his company name to Steelco's receptionist, which is unusual, and he and Volma Heaton always met behind closed doors, which never happened with anyone other than Hurst. [R450 at 68-70; R452 at 25-26, 79-80.] Steelco's employees were left with the impression that Hurst was only a social acquaintance of Heaton's. [R452 at 26.]

The delivery process was also suspicious. Heaton's deliveries were generally after Steelco's business hours. [R451 at 1, 103-04.] Hurst sometimes went to Steelco's premises and picked out what he wanted, which was thereafter delivered to Wasatch Steel, but Hurst inexplicably paid Heaton for the steel. [R450 at 66-67.] Hurst with Heaton actually entered Steelco's shop and picked out for his purchase remnant, which he (as a person in the steel business) knew or should have known was used and needed by Steelco. [R450 at 66-67.] Any rational person would think it strange to enter another steel company's shop, designate for purchase remnant material from remnant racks, which are obviously

used by that business, and then pay the company's employee for that steel at a fraction of its true value. Wasatch Steel purchased the remnant for a fraction of its value to Steelco, which Hurst also knew or should have known. [R450 at 52-53.] Wasatch Steel paid both Steelco and Heaton for exactly the same kinds of materials in the amounts directed by Heaton, even though all of the steel came from Steelco. [R450 at 56-57, 66-67.] Many of the deliveries of steel for which Heaton was paid were by Steelco's trucks, identified as such, yet Wasatch Steel paid Heaton for the steel. [R451 at 1, 114; R450 at 58-65.] There is no plausible reason why Steelco would furnish its own trucks to deliver its own steel to Wasatch Steel so that Heaton could be paid for the steel. When Steelco's employees and trucks were used to deliver steel to Wasatch Steel, Hurst and Heaton arranged to split Wasatch Steel's payment between Heaton and Steelco. [R451 at 4-5.] That, of course, left Steelco with the impression that it was being paid for all of the steel that its trucks and employees removed from Steelco's premises. Even though, on multiple occasions, the weight tickets delivered to Hurst showed the customer to be "Steelco," Hurst nevertheless paid Heaton for the steel. [R450 at 58-63.] Hurst told Heaton "I don't care who I pay." [R451 at 114-15.]

Wasatch Steel suggests in its brief that it was justified in assuming that Heaton had the right to sell the steel since Heaton

was a supervisor. Wasatch Steel and Hurst could not have assumed Heaton's bona fides, since they were concurrently paying him kickbacks and bribes to defraud his employer -- a practice that Hurst, himself, called "sleazy." [R450 at 80-81.]

Over a four-plus year period, Heaton delivered to Wasatch Steel on the order of 100 loads of steel, for which Wasatch Steel paid Heaton the bargain price of $38,136.43. [Exhibit 27-P; R452 at 150-52.] The value of those same materials to both Steelco and to Wasatch Steel was approximately double that amount. [R450 at 52-53; R452 at 169-70.]

Wasatch Steel in its brief suggests that Steelco was awarded damages against Wasatch Steel and Hurst for steel delivered to them which either (i) was given to Heaton by Steelco or (ii) for which Heaton paid Steelco. No evidence supports either assertion, and each will be addressed in turn.

The district court found that on one specific occasion, Steelco did agree with Heaton that Heaton could have certain specific scrap fabricated beams and old scrap fabricated steel equipment if Heaton would on his own time cut up and remove those specific materials from Steelco's premises. That arrangement related only to specifically identified fabricated steel of a quantity that did not exceed 40,000 pounds. [Finding of Fact ¶10; R338.] The trial court found that with the exclusive exception of a maximum of 40,000 pounds of scrap that was so

given to Heaton, all of the steel delivered to Wasatch Steel was stolen. [Id.] The trial court did not award any damages to Steelco for that 40,000 pound quantity of scrap that was given to Heaton -- the value of that 40,000 pound quantity was deducted from the amounts for which Wasatch Steel was found liable. [Finding of Fact ¶58, R356.] Steelco's General Manager, Leon Hansen, testified that the maximum amount of fabricated steel and old equipment that was given to Heaton was 40,000 pounds and that it was all scrap. [R450 at 132-36.] Heaton testified that the only material given to him was scrap, which he sold to Wasatch Metals. [R451 at 12-14.] Hurst testified that he did not intend to purchase scrap from Steelco -- only remnant. [R450 at 40-41.]

With respect to the steel for which Heaton paid, the evidence is also clear and uncontradicted. Heaton himself testified that he paid a total of only $200 to $300 to Steelco for his personal purchases of material. [R450 at 202; R451 at 90.] Bob Elkington, Steelco's Chief Executive Officer, searched all of Steelco's records for invoices evidencing Volma Heaton's purchases throughout his employment and located only invoices totaling approximately $400. [Exhibit 16-P; R452 at 136-37.] All invoices showed that payment was effected with cash. [Exhibit 16-P.] The documents are therefore fully consistent with Heaton's testimony as to the approximate magnitude of his cash payments. There was no evidence that any additional amounts were paid to

Heaton for material purchases. The trial court found that all of the materials for which damages were awarded were stolen by Heaton and not paid for. [Finding of Fact ¶11; R338.]

Hurst and Wasatch Steel, in addition to knowingly receiving vast amounts of stolen steel, bribed Steelco's employees to cause Steelco to pay fraudulently inflated amounts for steel purchased from Wasatch Steel. Hurst admitted paying kickbacks to Volma Heaton but denied paying any kickbacks to Chris Williams. Accordingly, the Heaton and Williams kickback situations will be addressed separately.

Hurst admitted paying at least four kickbacks to Heaton. [R450 at 90-92.] Hurst was impeached with his deposition at trial. In his deposition, Hurst admitted that, at the time he paid the kickbacks, he thought it was a "sleazy" practice, that it caused his view of Heaton's integrity and honesty to drop, and that Hurst would have immediately fired one of his own employees if that employee accepted kickbacks under the very same circumstances -- Hurst explained that an employee's receipt of kickbacks was obviously not in the employer's best interest. [R450 at 79-81, 89.] In his trial testimony, Hurst changed his mind and remarkably testified that, so long as the price of the material was competitive, he would not care whether his employees received secret kickbacks; indeed, he said he would be impressed with their initiative! Mr. Hurst's extraordinarily conflicting

and unbelievable trial and deposition testimony on this subject is found at R450 at 78-89. Hurst also said, on the one hand, that the greater his profit margin, the greater the kickback he would pay, but on the other hand, the fact that he paid the kickback would not necessarily increase Steelco's cost of material. [R454 at 147, 150-51.] When asked if Hurst would have sold Steelco the same material at his price less the kickback amount (which would yield Wasatch Steel the exact same amount), Hurst was not sure. [Id.]

Hurst initially testified that Heaton was being paid only to arrange the purchases and was not being paid to cause his employer to pay an inflated price. [R450 at 71-72.] When he paid the kickbacks, Hurst knew that Heaton was a participant in the negotiations on behalf of Steelco to purchase the steel. [R450 at 75.] After first flatly denying it, Hurst finally admitted that Heaton had told him "I need some commission [a kickback] to get them [Steelco] to use this rough of material." [R454 at 152-54.] As will be seen, the material Hurst sold Steelco was very rough -- it was in large part unusable junk.

The kickbacks were as much as 25% of Wasatch Steel's margin -- a big chunk. [Exhibit 28-P.] One kickback transaction will illustrate what is going on here. Wasatch Steel purchased one load of junk steel at 8¢ per pound and immediately resold it to Steelco for 13½¢ per pound -- Hurst received almost $2,000 for

in effect making the kickback telephone call. Somebody else even did the delivering for Hurst. In return, Hurst paid Heaton 1½¢ per pound ($497.70) -- about 25% of Hurst's margin for causing his employer to buy the junk. [Exhibit 57-D; Exhibit 13-P, Tab 3.]

The materials that were sold under the kickback arrangements were obviously bad. To serve its purpose, the steel material on which kickbacks were paid had to be unlaminated, relatively smooth, and free of holes. [R452 at 80, 85; R450 at 145.] The materials that Hurst delivered were laminated, rough, of irregular shapes, and had holes in them. They were, in fact, junk. [Exhibits 35-P through 44-P; R452 at 80-94.]

Volma Heaton testified that Hurst paid him at least four kickbacks in addition to four admitted by Hurst, for a total of at least eight kickbacks. [Exhibit 13-P; R451 at 26-30.] Although Hurst at trial admitted paying Heaton only four kickbacks, he also testified that he did not know whether the remaining four identified by Heaton were, or were not, kickbacks. [R450 at 94-100.] The additional four kickbacks, however, were paid close in time to Steelco's purchase of the goods in question, all bear a precise mathematical relationship to the number of pounds sold to Steelco, and all were identified by Heaton as kickbacks. [Exhibit 13-P; R451 at 26-30.]

With respect to each kickback transaction, Heaton would call Hurst on the telephone and indicate that he could cause Steelco to purchase certain material. Hurst would quote a price after which Heaton and Hurst would agree to jack up that price and to pay a portion of the increase back to Heaton as a kickback. Heaton always told Hurst that Steelco was not to know about their arrangements and Hurst agreed to keep their arrangements secret. [R451 at 23-24, 31-32.] After their arrangements were complete, Heaton would arrange for Steelco's purchasing department to issue a purchase order for the materials in question at the fraudulently inflated price or, on occasion, Heaton would issue a purchase order himself for the inflated price. [R451 at 23-24.] Steelco's purchasing department was never informed of the kickback arrangements. [R451 at 31; R452 at 54.]

Chris Williams first became involved with Wasatch Steel by assisting Heaton with his deliveries to Wasatch Steel on 8-12 occasions. Heaton and Williams became friends, and Heaton told Williams about his kickback arrangement with Wasatch Steel. [R451 at 148-52.] The trial court found that Wasatch Steel and Hurst paid to Chris Williams kickbacks in a minimum aggregate amount of $5,700 during 1986. [Finding of Fact ¶32; R345.] Chris Williams, like Volma Heaton, testified that she negotiated with Hurst on Steelco's steel purchases from Wasatch Steel, that Hurst would initially quote a price, and that the price to be

paid by Steelco was thereafter jacked up in connection with a conversation in which Hurst agreed to pay a kickback to Chris Williams. [R451 at 152-53.] Unlike Heaton, who was paid his kickbacks by check, Williams was paid in cash. Williams and Hurst split the total amount of the price increase, with Williams receiving about 80% and Hurst receiving about 20%. [R451 at 187-90.] It is not surprising that the procedure was similar for both Heaton and Williams, since Heaton initially told Williams about his obtaining kickbacks from Hurst. [R451 at 151-52.]

Hurst, on the other hand, testified that he had never met or seen Chris Williams prior to the initiation of this action. [R450 at 108.] Both Chris Williams and Volma Heaton testified that Chris Williams accompanied Heaton on many of his delivery trips to Wasatch Steel and that Heaton formally introduced Chris Williams to Hurst on at least one occasion. [R451 at 6, 148-50.] Volma Heaton testified that Hurst joked to Heaton about an old man like Heaton being with a pretty young woman like Chris Williams. [R451 at 6.] Patty Midgley, another Steelco employee, confirmed that Chris Williams knew Hurst during 1986 and that in fact Hurst once greeted Chris Williams in the presence of Patty Midgley at a movie theater. [R452 at 28-30.]

In their statement of facts, defendants attempt to develop minute and irrelevant mathematical disparities in the kickback transactions. These minor "disparities" exist, however, only if

Chris Williams was paid the exact amounts on the three exact transactions identified by defendants, and no others. Chris Williams never testified that she was sure of the exact transactions on which she was paid kickbacks, that she was sure of the precise amounts involved on any transaction, that she was sure of the period of time during which she received the kickbacks, or that she was sure of the number of kickbacks she was paid. She said she could not be sure of the details because the transactions occurred over four years ago. What she did say was that she was sure she received a total of approximately $6,000 in kickbacks, that she thought she received them in at least three transactions, and that with respect to each, Hurst quoted a selling price which was jacked up by an agreed amount which was thereafter split between Chris Williams and Hurst. [R451 at 152-53, 169, 186, 204-05.]

At trial, Wasatch Steel claimed that it never had enough cash to pay Chris Williams what she claimed to have been paid. Even defendants' own self-serving summary shows that Wasatch Steel deposited over $18,000 per month in cash. [Exhibit 53-D.] Hurst admitted that Wasatch Steel takes in about $120,000 per month in revenue, but that he could not even estimate the percentage of that amount that was cash. [Exhibit 50-P; R454 at 16-20.] Whether businesses that knowingly receive stolen property and pay bribes report all cash receipts is open to fair

question. Chris Williams received a total of only $6,000. As Hurst testified, only he and his father-in-law, Bill Holtman, handled cash. [R450 at 34.]

Hurst's production at trial of information concerning cash receipts is itself most interesting. When asked about these very same cash receipt records in his deposition, Hurst testified that all of his "records detailing cash transactions" were stolen at the end of 1987, coincidentally within a very short time after Hurst learned that Steelco was investigating Heaton's dealings with Wasatch Steel. [R454 at 120-26.] Notwithstanding this theft of "everything," and that as a result, he didn't "have any records detailing cash transactions," Hurst was inexplicably able to locate the same cash records that he claimed had been stolen to prepare Exhibit 53-D and offer it into evidence as the only evidence of his cash receipts. [R454 at 119-21.] When Hurst was deposed prior to trial, however, he very clearly stated under oath that all of Wasatch Steel's cash records were unavailable because they had been stolen. [R454 at 122-23.] Hurst stated in his deposition, "I don't have any records detailing cash transactions" for 1986. [R454 at 123.] At trial, Hurst testified that he researched his records and came up with a summary of cash deposits for May, June, and July, 1986. [R454 at 120.] Linda Bryant, who Hurst testified was his bookkeeper, and from whom the records were allegedly stolen, was not called by Wasatch Steel as

a witness at trial to confirm the alleged theft. It is not surprising that the trial court chose not to believe Mr. Hurst in all respects.

During mid-1986, Steelco discovered approximately $1,000 in cash missing and conducted an investigation into the identity of the thief. Steelco ultimately satisfied itself that Chris Williams was the party that had stolen the cash and fired her in June of 1986. The cash thefts had nothing to do with Wasatch Steel. At the time that Steelco fired Chris Williams, Steelco had no knowledge of Volma Heaton's thefts or Wasatch Steel's kickbacks to Heaton and Williams. [R452 at 122-23; R451 at 155-56.]

During December of 1987, Steelco for the first time learned that Volma Heaton was stealing its steel products. [R452 at 125-27.] Bob Elkington, Steelco's chief executive, interviewed Volma Heaton and learned that some of the material had been sold to Wasatch Steel. [R452 at 128-29.] When Elkington contacted Hurst to pursue the investigation further, Hurst refused to tell him anything before he talked to his attorney. [R452 at 130.] Even though Hurst knew that Steelco was Heaton's employer and that Steelco was the party from which the steel came, he refused to talk to Elkington, who he knew to be a Steelco management person. Before showing Elkington anything, Hurst first spoke to Heaton. [R450 at 101.] After Heaton and Hurst talked, Heaton

gave Bob Elkington a letter in which Heaton indicated that he and Hurst had found that "he [Hurst] had paid me a total of $9,185.85" and that "if you like please call Lynn and he can confirm this amount." [Exhibit 20-P; R452 at 130.] The $9,185.85 figure was a false number that was a small fraction of the amounts that Wasatch Steel had in fact paid Heaton. Elkington then called Hurst, who confirmed the phony $9,185.85 number. [R452 at 131-32.] Nevertheless, Elkington insisted on seeing Wasatch Steel's records concerning the Heaton payments. [R452 at 132.] Hurst further delayed Elkington's access to the records by demanding Heaton's written permission for Elkington to see the records. [R452 at 132.] When Elkington finally met with Hurst on December 31, 1987, Hurst did not show him all of his records, but only the receipts that he, Hurst, had himself pulled from the records, year by year. [R452 at 133.] Elkington asked to see Wasatch Steel's records for years prior to 1985, but Hurst said the information was no longer available, which was false. [R452 at 134; Exhibits 1-P and 2-P.] Although Hurst at trial admitted paying Heaton four kickbacks, he did not tell Elkington about any of these kickbacks in December of 1987, even though he knew Elkington was there to investigate the dishonest activities of Heaton with Wasatch Steel. [R450 at 106-07.] One of the receipts that Hurst showed Elkington did happen to identify a "commission" paid to Heaton in the amount of $85.44. [Exhibit

14-P; R450 at 104; Exhibit 4-P.] There was no indication that the "commission" related in any way to Steelco's purchase of materials. Because of its insignificant amount and Elkington's assumption that it related to something unrelated that Heaton had done for Wasatch Steel, Elkington thought nothing of it. [R453 at 12.] Although Elkington asked Hurst whether any other Steelco employees were involved, Hurst did not identify Chris Williams, even though she participated in the deliveries and was paid kickbacks. [R452 at 135.]

A few months later, Steelco and Heaton entered into a Settlement Agreement under which Heaton repaid to Steelco a portion of its losses and warranted that he had fully disclosed all of his unlawful activities to Steelco. [Exhibit 22-P; R452 at 138.] That warranty was inaccurate in multiple respects. At the time the agreement was signed, Steelco had no knowledge of the kickbacks, of sales of stolen materials to others, or of Wasatch Steel's complicity in Heaton's thefts. [R452 at 147.]

About six months later, on October 7, 1988, Chris Williams, voluntarily and on her own initiative, contacted Elkington at Steelco. [R451 at 158; R452 at 141.] Chris Williams had been a drug addict who stole from Steelco during her employment to support her habit. After she was fired by Steelco for stealing $1,000 in June, 1986, Williams in October, 1987 checked herself into a drug treatment center and kicked her drug habit. [R451 at

155-57.] As a part of her recovery, Chris Williams became active in Alcoholics Anonymous. After consultation with her counselors, Chris Williams determined that it was important to make a full disclosure to Steelco of the extent of her thefts, which she had not done previously. [R451 at 158, 200-01.] Although she had been fired two years earlier and had since had no contact with Steelco, Chris Williams contacted Elkington and told him that she desired to make full disclosure concerning her unlawful activities. She explained to Elkington that the cash theft for which she was fired was only a small amount of her unlawful receipts and advised Steelco of her receipt of approximately $6,000 in kickbacks. She did not initially, however, advise Elkington of the identity of the party paying the kickbacks. [R451 at 158; R452 at 141-44.] In October, 1988, Chris Williams finally identified Wasatch Steel as the party paying the kickbacks. [R452 at 146.] Until Chris Williams made this disclosure, Steelco did not know that Wasatch Steel had paid kickbacks to Heaton or that Wasatch Steel was knowingly acting improperly in its dealings with Heaton.

Because of the revelation of Chris Williams that Heaton had also been paid kickbacks and the discovery of other sales of stolen steel by Heaton to additional previously undisclosed parties, Steelco and Heaton rescinded the Settlement Agreement between them and agreed that the amounts Heaton had previously

paid to Steelco could be allocated to whatever losses that Steelco had suffered as a result of Heaton's improper activities. [R452 at 147-48; R451 at 45.]

SUMMARY OF ARGUMENTS

1. The Heaton-Steelco Settlement Agreement Has no Effect Upon Steelco's Claims Against Defendants. This issue was not properly raised below. The Settlement Agreement does not affect Steelco's claims against defendants and has, in any event, been rescinded.

2. Limitations Poses no Bar. Limitations poses no bar because defendants raised the limitations period below only concerning the conversion claim, this action was filed within the limitations period after plaintiffs' discovery of its claims, and defendants fraudulently concealed the facts from plaintiffs.

3. The Court's Findings are Supported. The trial court's findings of fraud, conspiracy, and conversion are supported by the evidence.

4. The Measure and Calculation of Damages was Appropriate. The trial court used the correct measure of damages, attorney's fees are mandated here, and punitive damages in the amount awarded are appropriate.

5. Steelco is Entitled to Recover Under the Racketeering Enterprises Act. The court's findings establish each element necessary to establish a claim under this law.

6. Steelco is Entitled to Recover Under the Receiving Stolen Property Act. The trial court's findings establish each element required to recover under this law.

ARGUMENT

I. THE HEATON-STEELCO SETTLEMENT AGREEMENT HAS NO EFFECT UPON STEELCO'S CLAIMS AGAINST DEFENDANTS

Shortly following Steelco's discovery of Volma Heaton's thefts, Steelco and Volma Heaton entered into a certain Settlement Agreement. [Exhibit 22-P.] That agreement provided:

> 9. Agreement Not to Sue. If, but only if, (a) Heaton timely pays and performs each and every obligation under this Agreement and under each instrument, document and agreement delivered by Heaton to the Company [Steelco] pursuant to this Agreement; and (b) all of the representations and warranties of Heaton set forth in this Agreement or otherwise made to the Company are and remain true, accurate and complete, the Company shall not initiate or join in a lawsuit or any other action against Heaton in connection with the wrongful and unlawful transactions and circumstances covered by this Agreement.

Wasatch Steel and Hurst argue that this provision amounts to a release without reservation of a joint tortfeasor which under Utah Code Ann. §15-4-4 operates to release all other joint tortfeasors -- Hurst and Wasatch Steel. Wasatch Steel is wrong upon a host of grounds.

A. The Utah Joint Obligations Act Defense was not Properly Presented Below. Defendants argue that the Utah Joint Obligations Act, Utah Code Ann. §15-4-4, bars Steelco's recovery in this case. Defendants' Amended Answer, in Second Affirmative Defense, referred to the Settlement Agreement and alleged only that "[t]he Agreement contains no reservation of rights and therefore constitutes a complete bar to Plaintiff's action." [R88.] The Amended Answer did not refer to Section 15-4-4 and did not suggest that the defense was in any way premised upon the release of a joint obligor. Defendants' final argument is contained in its Memorandum and Argument, which makes absolutely no reference to any such defense. [R387.]

This Court normally will only consider questions which were properly raised below. E.g., Crookston v. Fire Ins. Exchange, 164 Utah Adv. Rep. 3, 7 (Utah 1991); Loveland v. Orem City Corp., 746 P.2d 763, 767 (Utah 1987). Even assuming that the Amended Answer properly raised this theory, defendants' failure to argue the theory to the trial court precludes their raising it for the first time on appeal. In Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982), plaintiff successfully sued for breach of a covenant not to compete. On appeal, the defendants contended that the covenant not to compete was contrary to public policy. The Supreme Court unanimously held:

> The defendants' contention that the covenant not to compete was contrary to public policy was raised as a defense in their answer, but no argument was made to the district court on this issue and no evidence was presented. This Court will not consider on appeal issues which were not submitted to the trial court and concerning which the trial court did not have the opportunity to make any findings of fact or law. Id. at 672.

Defendants cannot be said to have given the district court an opportunity to rule upon their unarticulated, unargued theory. Under this Court's established rule, this theory of defense should not be considered now.

B. Utah Code Ann. §15-4-4 (1986) has Been Repealed Pro Tanto. Utah Code Ann. §15-4-4 provides in substance "that a release of one joint obligor releases all other obligors unless the injured party expressly reserves in writing its rights against the other obligors." Krukiewicz v. Draper, 725 P.2d 1349, 1350 (Utah 1986). There is a clear conflict between that statute and Utah Code Ann. §78-27-42 (1986), which was enacted much later in time. The latter provides:

> A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

In Krukiewicz, the Supreme Court held that Section 78-27-42 is a pro tanto repeal of Utah Code Ann. §15-4-4:

> Section 78-27-42 is "by necessary implication" a pro tanto repeal of §15-4-4 of the Joint Obligations Act, U.C.A., 1953,

> §15-4-1, to -7, which states that a release of one joint obligor releases all other obligors unless the injured party expressly reserves in writing its rights against the other obligors. Id. at 1350.

After explaining that Section 78-27-42 is derived from the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 57 (1975), the Court noted that "[a] primary purpose of the Uniform Act was to change the common law rule so that release of one joint tort-feasor did not automatically release all tort-feasors." Id at 1351. Thus, the rule is settled in Utah that the Legislature's enactment of Section 78-27-42 repealed, pro tanto, Section 15-4-4, upon which Wasatch Steel exclusively relies.

The cases advanced by defendants in support of their argument that the release of one joint obligor without express reservation of rights against other joint obligors releases the others are all inapposite. Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972) was overruled by Krukiewicz. Defendants incorrectly state that Krukiewicz overruled Holmstead "on other grounds." The Krukiewicz Court stated that "[t]he sole issue on appeal is whether §78-27-42 of the Utah Comparative Negligence Act overrules Holmstead." Id. at 1350. The Krukiewicz Court unanimously held that Section 15-4-4 was pro tanto repealed and that Holmstead was thus overruled. The issue involved in Krukiewicz, Holmstead, and this case is identical. The other cases advanced by defendants in support of their argument that

the release of one joint tortfeasor releases them all predate Krukiewicz and come from other jurisdictions. Many deal with the separate issue of whether plaintiff can make a double recovery, and none are directly on point. The only two Utah cases in addition to Holmstead cited by defendants apply Utah Code Ann. §15-4-3, not 15-4-4, and stand for the proposition that the plaintiff cannot make a double recovery, not for the proposition that the release of one joint tortfeasor releases all joint tortfeasors. See Jorgensen v. Aetna Casualty & Surety Co., 769 P.2d 809 (Utah 1988) and Western Steel Co. v. Travel Batcher Corp., 663 P.2d 82 (Utah 1983).

Krukiewicz also defeats defendants' argument that the Comparative Negligence Act does not apply to intentional torts. The Krukiewicz Court stated:

> Section 78-27-40(3), patterned after the 1939 Uniform Act, defines a joint tort-feasor in terms of liability, not negligence: Joint tort-feasor means "one of two or more persons, jointly or severally liable in tort. . . ." Id. at 1351.

Thus, despite its name, the Utah Comparative Negligence Act applies no matter what theory of liability is advanced by the plaintiff. Krukiewicz at 1352.

Section 15-4-4 is a codification of an old common law rule that the release of one joint tortfeasor releases all others unless the injured party reserves its rights against the other

joint tortfeasors. Krukiewicz at 1350. The harsh, illogical old common law rule has, however, fallen into disfavor. Recognizing that a party should be deemed to release "only those other parties whom he intends to release," the United States Supreme Court has repudiated the common law rule. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971). The Restatement (Second) of Torts has also abandoned the old common law rule:

> A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them. Restatement (Second) of Torts, §885(1) (1977).

Since the rule that is codified in Section 15-4-4 has been generally abandoned, it would make no sense for this Court to reexamine its determination that Section 15-4-4 is no longer effective.

C. The Covenant Not to Sue Never Became Effective. As quoted above, Steelco's covenant not to sue Heaton became effective "if, but only if, . . . all of the representations and warranties of Heaton set forth in this Agreement or otherwise made to [Steelco] are and remain true, accurate and complete." [Exhibit 22-P ¶9.] As the trial court found, Heaton's warranty in paragraph 1 that he had fully disclosed all of his wrongful and unlawful activities was false when made. [Findings of Fact

¶¶54, 55; R355.] The court's finding is abundantly supported by the evidence that, among other things, Heaton substantially understated his deliveries to Wasatch Steel and All Star Manufacturing, Heaton was paid undisclosed kickbacks, and Heaton sold substantial stolen steel to previously undisclosed parties, including Davis Supply and Mr. Trailer. These breaches are fully detailed and supported at pages 35-38 of this brief.

Since Heaton's warranties in the Settlement Agreement were false, by the very terms of paragraph 9, the covenant not to sue never became operative, and no "release" of any joint tortfeasor occurred.

D. A Covenant Not to Sue Does Not Constitute a Release. Even if Section 15-4-4 is resurrected, and even if the covenant not to sue somehow became operative notwithstanding Heaton's false warranties, nevertheless the covenant did not constitute a "release." Many jurisdictions have adopted a covenant not to sue as a device for evading the now-discredited common law rule that a release of one joint tortfeasor releases all. Annotation, Release of One Joint Tortfeasor as Discharging Liability of Others: Modern Trends, 73 A.L.R. 2d 403, 418 (1960). The Restatement adopts this view as well: "A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor liable for the same harm." Restatement (Second) of Torts §885(2) (1977).

The Court in Bergeson v. Life Ins. Corp. of America, 170 F. Supp. 150 (D. Utah 1959), applying Utah law, held:

> Satisfaction of judgment against one of two or more joint and several obligors will bar an action against the remaining obligors. On the other hand, a mere covenant not to sue one joint and several obligor does not release the remaining obligors. Id. at 160.

Similarly, in United States v. First Security Bank, 208 F.2d 424 (10th Cir. 1953), the Court implied that a covenant not to sue is not "an outright release from liability" and "does not bar an action against other joint tortfeasors." Id. at 428. Two Utah Supreme Court opinions also implicitly recognize that a covenant not to sue does not release other joint tortfeasors when the plaintiff has not gained full satisfaction of his claims. In Green v. Lang Co., 206 P.2d 626 (Utah 1949), the Utah Supreme Court allowed a plaintiff to pursue a second joint obligor after the plaintiff had executed a covenant not to sue the first. In Dawson v. Board of Education, 222 P.2d 590 (Utah 1950), the Court elaborated on the characteristics of a covenant not to sue which distinguish it from a complete release: "In a true covenant not to sue, the amount of damages is uncertain, the party does not intend to fix the loss by the agreement, and full satisfaction is not admitted." Id. at 593 (emphasis added). The covenant not to sue Heaton, even if effective, does not operate to bar claims against joint tortfeasors under Section 15-4-4.

E. The Settlement Agreement was Rescinded. The trial court found that Steelco and Heaton agreed to rescind the Settlement Agreement and that Steelco was entitled to do so even absent the agreement of Heaton because of Heaton's misrepresentations and omissions. [Finding of Fact ¶55; R355.] The rescission agreement is marked as Exhibit 24-P. By the terms of paragraph 1 of that agreement, the Settlement Agreement was rescinded in its entirety. Wasatch Steel implausibly argues that all of the parties to the Settlement Agreement could not rescind it, but offers no authority for this obviously incorrect proposition. It is true that the rescission agreement was executed after the filing of this lawsuit, but it is also true that the issue of the rescission was tried with the consent of both parties and the court made specific findings upon that issue.

Wasatch Steel next argues that no consideration supported Heaton's agreement to rescind. First, the law does not require consideration to support a rescission, and Wasatch Steel offers no authority to the contrary. Second, by rescinding both parties' obligations under the Settlement Agreement, Heaton was relieved of multiple obligations under the Settlement Agreement which provide ample consideration, even were it required. Heaton was relieved of his warranties under paragraph 1, Heaton was relieved of the confession of judgment appearing in paragraph 3, Heaton was relieved of his assignment of amounts due him under

paragraph 5, Heaton was relieved of his noncompetition agreement in paragraph 7, and Heaton was relieved of his indemnification obligations under paragraph 10. There was plenty of consideration, if consideration is required.

Defendants remarkably argue at pages 33-34 of their brief that Heaton's warranties were not inaccurate or false. Defendants' statements are absolutely contrary to the court's findings and to the record. The trial court found that Heaton's warranty that he had fully disclosed all of his wrongful and unlawful activities in steel sales to Steelco was false. [Finding of Fact ¶54; R355.]

In the Settlement Agreement, Heaton warranted "that the schedule attached to this Agreement as Exhibit A is true, accurate and complete and sets forth the full and complete details of each and every transaction and circumstance in which Heaton was involved during his employment by the Company [Steelco] in which Heaton acted wrongfully or unlawfully. . . ." Following are some of the respects in which Exhibit A to the Settlement Agreement was inaccurate and incomplete:

First, Exhibit A indicates that Heaton received only $10,718.70 through his sale of materials to All Star Manufacturing. As the court found, Heaton sold more than double that amount to All Star Manufacturing -- a total of $24,789.55. [Finding of Fact ¶57; R356; Exhibit 29-P (which computes the

total value of the subject steel in relation to the amounts paid to Heaton).] Heaton testified that All Star or its owner, Jim Shaw, paid him in cash the total sum of $8,657.97. [R451 at 34-35; Exhibit 19-P.] In addition to that cash, Heaton testified that Shaw and/or All Star traded him trailers and trailer parts valued at between $12,000 and $15,000 for additional steel he stole from Steelco. [R451 at 35-37.] This testimony was undisputed.

Second, Exhibit A estimated Heaton's sales to Wasatch Steel during 1983 and 1984 to be $5,000. As the evidence reflects, Heaton was paid almost double that amount during 1983 and 1984. [Exhibit 27-P.] Wasatch Steel asserts at page 33 of its brief that, with respect to sales during 1983 and 1984, Elkington was told that the 1983 and 1984 documents would be made available at a more convenient time and with Heaton's authorization. No citation to the record is found because the record does not support that assertion. Elkington testified that he requested those records and Hurst told him that they were no longer available. [R452 at 134.] Hurst testified that he didn't show the 1983 and 1984 records to Elkington because Heaton had not given his permission. [R450 at 104.] If that were true, why wouldn't Elkington have sought Heaton's permission, which was given when requested for 1985 records? [R452 at 134.] It makes no sense.

Third, Heaton did not disclose to Steelco that he had received kickbacks in an aggregate amount of over $4,000 from Wasatch Steel. [Exhibit 28-P.] Heaton disclosed none of those kickbacks in the Settlement Agreement. Wasatch Steel argues that because Hurst showed Bob Elkington a receipt showing a "commission" for less than $100 which had no indication that it was a kickback or even concerned Steelco, somehow Steelco was charged with knowledge of all of the kickbacks paid by Wasatch Steel, even though the evidence is undisputed that Steelco was not aware of them. Even with respect to the vague, minuscule "commission" payment of ninety-odd dollars that was shown to Elkington, Elkington testified that he assumed that Heaton had been paid for doing something else for Wasatch Steel and that he thought nothing of it. [R453 at 12.] Although Elkington did concede that it was possible that he talked to Hurst about this "commission," even though he did not recall it, he was sure that any such conversation did not lead him to believe that Wasatch Steel was paying Heaton for arranging Steelco's purchases at inflated prices. [R453 at 12.] In Hurst's version of his conversation with Elkington, he never mentioned any discussion on the subject of commissions. [R450 at 102-07; R454 at 92-98.] Everyone agrees that Hurst did not disclose at least seven kickbacks to Elkington, which amounted to about $4,000.

Fourth, although Exhibit A identifies only Wasatch Steel and All Star Manufacturing as the parties to whom Heaton sold steel, Elkington learned, later, that Heaton was also selling steel to Mr. Trailer and Davis Supply. [R452 at 147.]

As the foregoing reflects, Wasatch Steel's statement that Exhibit A to the Settlement Agreement was accurate is simply and demonstrably wrong. Each of the four misrepresentations and omissions in Exhibit A are uncontested. There was ample basis for rescission.

II. LIMITATIONS POSES NO BAR

As the statement of facts above reflects, Wasatch Steel and Hurst perpetrated an integrated fraud upon Steelco. Wasatch Steel and Hurst bribed Steelco's employees and conspired with Heaton to systematically steal from Steelco its remnant material. An essential ingredient of that fraudulent scheme, as the trial court found, was concealment of these outrageous arrangements from Steelco, a concealment in which Wasatch Steel and Hurst actively participated. Defendants now incredibly argue that Steelco's claims should be barred because they were so successful in concealing from Steelco the fraud that was being perpetrated upon it.

Steelco sought recovery for the same losses based upon five theories -- conversion, fraud, conspiracy, racketeering, and receiving stolen property. The court found separately the

damages recoverable by Steelco for the stolen steel and the kickback transactions under the conversion, fraud, and conspiracy theories. The damages recoverable under the racketeering and receiving stolen property statutes have already been found by the trial court, although recovery was denied upon legal grounds that Steelco challenges below. Thus, even if Wasatch Steel is successful in persuading the Court that the limitations period has expired with respect to part of Steelco's conversion claim, Steelco is nevertheless entitled to recover for the same loss under its fraud, conspiracy and remaining claims, with respect to which there is unquestionably no limitations defense.

A. The Limitations Issue was not Properly Raised Below. Although defendants in their Amended Answer pleaded the limitations periods prescribed in Section 78-12-25 and -26 [R89], defendants' arguments to the court addressed only limitations with respect to the conversion claim. [R405.] As indicated above at pages 27-28, even if a defense is raised in a party's pleading, unless the matter is presented to the court for decision in argument to enable the court to address the subject, the defense is not properly presented on appeal. Accordingly, by not properly raising them below, all limitations arguments other than those that may relate to the conversion claim should not be considered on appeal.

B. As to all of Steelco's Claims, Limitations Runs From Discovery. The limitations period for fraud is three years and "the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud. . . ." Utah Code Ann. §78-12-26(3). Steelco agrees with defendants that "[i]n an action based on civil conspiracy, the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged." [Wasatch Steel Brief at 35.] As the statement of facts makes clear, the nature of the action in which this conspiracy occurred is clearly one of fraud. Thus, Steelco's conspiracy claim is governed by the same limitations period as the fraud limitations period, which runs upon discovery. The limitations period with respect to the tort of conversion is three years as set forth in Section 78-12-26(2). That limitations period is the only one before the Court that is not made by statute expressly to run from discovery. Under the circumstances presented here, as the trial court found, the discovery rule should apply to all theories. [R351.]

The Supreme Court has firmly embraced the doctrine that the limitations period may begin to run when a party discovers the facts giving rise to his claim. E.g., Christiansen v. Rees, 436 P.2d 435 (Utah 1968). In Myers v. McDonald, 635 P.2d 84 (Utah 1981), the Supreme Court held that the discovery rule is based on a balancing test and is applied when "[t]he hardship the statute

of limitations would impose on the plaintiff in the circumstances of that case outweighed any prejudice to the defendant from difficulties of proof caused by damage caused by the passage of time." Id. at 87. In the Myers case, the Supreme Court concluded that because (i) defendant could not establish prejudice by having to defend a stale claim since "his problems of proof occasioned by the delay are no greater than the plaintiffs'" and (ii) "plaintiffs could not file an action for damages or even initiate investigative efforts to determine the cause of a [claim] of which they had no knowledge." Id. at 87. Similarly, in Klinger v. Kightly, 791 P.2d 868 (Utah 1990), the Court applied the discovery rule to a case of surveyor negligence, reasoning that, on balance, the prejudice to the claimant in having its claim barred outweighed the prejudice to the surveyor in that the surveyor could still testify although his crew's memories had dimmed and their survey notes were no longer available. See also Maughan v. S.W. Servicing, Inc., 758 F.2d 1381, 1386 (10th Cir. 1985) (applying Utah law) and Merkley v. Beaslin, 778 P.2d 16 (Utah App. 1989) (discovery rule applied in legal malpractice case). The trial court found all of the facts determined in Klinger and Myers to mandate application of the discovery rule here.

The trial court specifically found that the discovery rule should be applied in this case. [R351.] The trial court based

that finding upon its determination that the hardship that any limitations would otherwise impose upon Steelco outweighs any prejudice to Wasatch Steel and Hurst from difficulties of proof caused by the passage of time. The court specifically found that Wasatch Steel and Hurst could not establish any prejudice from having to defend a stale claim since the proof in this case was more accessible to them than to Steelco, the proof in substantial part was derived from defendants' own records and testimony, and defendants affirmatively concealed the facts from Steelco over an extended period of time. The court further found that Steelco could not file any action or even initiate investigative efforts to determine the existence of its causes of action since prior to discovery Steelco had no knowledge of its claims or any reason to suspect any claims existed.

Defendants' argument that the discovery rule should not apply in this case appears at pages 42-43 of their brief. There, defendants do not challenge the court's factual findings, other than inferentially, but instead advance unsupported and conclusory statements that are contrary to the court's findings. When an appellant assails the sufficiency of evidence supporting the trial court's findings of fact, it has the burden of marshaling all of the evidence in support of the trial court's findings and then demonstrating that the findings are so lacking in support as to be against the clear weight of the evidence. E.g.,

Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). When an appellant fails to carry its burden of marshaling the evidence, the appellate courts have refused to consider the merits of challenges to findings and have accepted the findings as valid. Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991); Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah App. 1989).

The trial court's findings are, however, amply supported by the evidence. The dates of delivery and amounts of stolen steel that was fraudulently acquired or converted by defendants were proved by defendants' own records. [Exhibits 1-P, 2-P, 3-P, 4-P, 5-P, and 6-P.] The only party who dealt on behalf of defendants with the transactions giving rise to these claims was Hurst, who was Wasatch Steel's general manager and controlling personality. Defendants therefore were not prejudiced in their defense by any lack of evidence. It is uncontested that Steelco had no knowledge of its claims or any reason to suspect that such claims existed until November of 1987 (with respect to the stolen steel) and October of 1988 (with respect to the kickbacks). Clearly, Steelco could not have filed any action until it discovered its claims. The extensive evidence supporting the court's finding that defendants fraudulently concealed their unlawful activities is set forth below at pages 49-52.

Defendants disingenuously suggest that there are no "exceptional circumstances" that warrant application of the discovery rule here. If a party, through fraud and conspiracy, can avoid liability for the damages caused by its activities by successfully misleading and deceiving the injured party and by concealing its fraud, then Steelco respectfully submits that there can be no circumstance sufficiently exceptional to mandate the application of the discovery rule. The Supreme Court has applied the discovery rule in far less exceptional circumstances. Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978) (defendant misled plaintiff regarding leaky pipe); Merkley, supra (legal malpractice); Klinger, supra (surveyor negligence).

In summary, the trial court found, as a matter of fact, each fact necessary to the application of the discovery rule in this case. Defendants have not challenged, properly or at all, those findings by the court. In any event, the court's findings are amply supported by the evidence.

C. Steelco did not Discover Either the Steel Thefts or the Kickbacks Within the Limitations Period. In paragraph 46 of its Findings of Fact, the court found that Steelco did not know and could not with reasonable diligence have learned of the facts giving rise to its claims against defendants arising from the stolen steel until at least November of 1987 and from the payment of kickbacks to Heaton and Williams until October of 1988.

[R350-51.] Defendants attack this finding at pages 40-41 of their brief. As indicated above, the appellant has the burden of marshaling all of the evidence in support of the court's decision and, if the appellant fails to do so, this Court need not consider those challenges and shall presume the court's findings to be supported by the evidence. In this section of defendants' brief, only one citation to the record appears, and it is misleading. Here is what defendants offer as the only record-supported evidence that plaintiffs exercised no diligence:

> . . . Steelco left its Superintendent in a position where he could do "almost . . . what he wanted" with the scrap material that plaintiff is now suddenly concerned about. [R.450 at 184.]

Here is an exact quotation of the record, which is the testimony of Heaton's supervisor, Leon Hansen:

> Q. He could almost do what he wanted over there, couldn't he?
>
> A. That is correct, yes.

Further down on the same page, Mr. Hansen testified that as to scrap, Heaton could have acquired 100 pounds of scrap, so long as it was for his own use. [R450 at 184.] Neither Leon Hansen nor any other Steelco employee testified that Heaton could do whatever he wanted with the scrap. On the contrary, all Steelco employees, including Heaton, testified that employees could purchase material only for their own use and were required to

follow usual paperwork procedures in their purchases. The remaining factual assertions contained at pages 40-41 (which include no citation to the record) are contrary to the record.

The trial court's findings as to the discovery and discoverability of Steelco's claims are amply supported by the record. Steelco's policy allowed its employees to purchase material for themselves at cost for their own use and required that such employee sales had to be documented in the ordinary course. [R450 at 126-27.] Heaton, from time to time, purchased material and followed those procedures. [R450 at 128-29; Exhibit 16-P.] When a Steelco supervisor on one occasion noticed that Heaton had failed properly to follow the paperwork procedures, he was issued a written warning. [Exhibit 18-P.] Heaton never spoke with his supervisors about purchasing materials and reselling those materials. [R450 at 137.] When Heaton's supervisor learned that Heaton was improperly removing material from Steelco, he was immediately fired. [R450 at 137.] When Steelco's employees were aware that material was being loaded for Heaton, Heaton created phony paperwork that indicated he had purchased the material from Steelco. That paperwork was thereafter destroyed by Heaton. [R450 at 203-04.] Heaton generally loaded the steel himself from the shop after Steelco's business hours, which concluded at 3:30. The shop, however, did not close at 3:30 -- there was a second shift in the processing and loading department, which was not

supervised by anyone other than Heaton. Heaton's supervisor, Leon Hansen, was not located in the shop area where Heaton loaded the steel -- he was located a block away. On those few occasions when Steelco personnel saw Heaton loading steel into his truck, he told them he was buying the steel. [R451 at 100-05.] When Steelco's trucks (rather than Heaton's truck) were involved in delivering steel to Wasatch Steel, Heaton arranged, with Hurst, to pay Steelco for a fraction of the total payment, which led Steelco to believe that it was being paid for all of the steel. [R451 at 113-15.]

Discovering Heaton's thefts was all the more difficult to discover because he did not steal uncut new material; rather, he stole the remnant material. The pieces of steel that remained after new stock pieces were cut to size could be either remnant or scrap. Scrap went into scrap tubs and was sold to scrap dealers and remnant went into remnant racks and was to be used in Steelco's own operation. [R450 at 118.] Obviously, keeping track of whether remnant material was disappearing was virtually an impossible undertaking.

The amount of steel stolen by Heaton, although large in absolute terms, was a minuscule percentage of the steel that passed through Steelco's facility during the same period. Heaton stole steel over a four calendar year period and received in the aggregate from Hurst just over $38,000 for the stolen steel.

[Exhibit 27-P.] Heaton was paid on the order of 8¢ per pound for the stolen steel. [Exhibit 6-P.] Thus, Heaton stole on the order of 475,000 pounds of steel over a four year period. On the other hand, 10-12 million pounds of steel is purchased and dealt with by Steelco each year [R452 at 41] -- on the order of 48 million pounds in four years. The steel stolen by Heaton was therefore less than one percent of the steel dealt with by Steelco during the same period.

Upon the first suggestion to Steelco's management of impropriety, management immediately commenced a thorough investigation which ultimately resulted in the discovery of Heaton's thefts. [R452 at 124-33.]

With respect to the kickback transactions, Heaton never inquired whether it would be permissible for him to receive a kickback for arranging steel purchases from his supervisor. [R450 at 141.] Heaton's supervisor was not aware that Heaton was receiving kickbacks from Wasatch Steel. [R450 at 141.] Chris Williams worked for Alene Lamoreaux, Steelco's purchasing agent. Ms. Lamoreaux was not aware that Heaton and Chris Williams were receiving kickbacks on Steelco's purchases from Wasatch Steel. [R452 at 54, 75.] The first occasion upon which Steelco's management learned of any kickbacks being paid to anyone was in October, 1988, when Chris Williams voluntarily came forward and

told Bob Elkington of the practice. [R451 at 158; R452 at 141-46.]

In summary, the trial court's finding that Steelco did not know and could not with reasonable diligence have learned of the facts giving rise to its claims with respect to the stolen steel until at least November of 1987 and with respect to the kickback transactions until October of 1988 is amply support by the record. Steelco had every reason to act upon any indication that its steel was being stolen or that its employees were accepting bribes. There is no evidence that Steelco received any such indication prior to the dates found by the trial court. Also contributing to the inability of Steelco's management earlier to discover these activities is the affirmative concealment practiced by defendants, which is detailed in the section that follows.

D. Defendants Concealed from Steelco its Cause of Action. The trial court found that the limitations period was tolled because Wasatch Steel and Hurst fraudulently concealed from Steelco its claims. [Finding of Fact ¶48; R352.] In that finding, the trial court identified various respects in which defendants acted to conceal their unlawful activities from Steelco. Those findings are all supported by the record.

One obviously sufficient circumstance of fraudulent concealment was the very fact of defendants' entering into a conspiracy

with Heaton and Chris Williams, as the court found, to engage in these unlawful activities and to keep them secret from plaintiffs. [Findings of Fact ¶¶14, 15, 42, 43; R339 at 349-50.] In addition, any act done by a co-conspirator in furtherance of the common plan is the act of all, and each actor is responsible for such act. E.g., Vaughan v. Hornaman, 195 Kan. 291, 403 P.2d 948 (1965). See, Israel Pagan Estate v. Cannon, 746 P.2d 785 (Utah App. 1987), cert. dismissed, 771 P.2d 1032 (Utah 1989). The Supreme Court has also recognized that the concealing acts of defendants' privies or insurance adjuster can toll the limitations period. Rice v. Granite School Dist., 456 P.2d 159, 163 (Utah 1969). Since Wasatch Steel and Hurst conspired with Williams and Heaton and since Williams and Heaton are defendants' privies for this purpose, the concealment acts of Heaton and Williams are attributed to Wasatch Steel and Hurst. Further, Wasatch Steel and Hurst, on their own, committed acts of concealment.

The steel was stolen after Steelco's regular business hours, when the entire Steelco plant other than the separate fabrication plant that Heaton supervised was closed. [R451 at 1, 103-04.] On the extremely limited occasions upon which Heaton was seen loading material by Steelco's management, Heaton assured them that he was purchasing the material. [R451 at 103.] When Steelco personnel were involved in the loading or delivery of the

steel, Heaton created phony paperwork to suggest that the steel was being legitimately purchased and thereafter destroyed it. [R450 at 203-04.] Hurst and Heaton agreed that their dealings would be kept secret and that Heaton would not tell Steelco's management what was going on. [R451 at 7-8.] Hurst conducted his dealings with Heaton in such a manner as to prevent Steelco's management from learning of those arrangements. [R450 at 68-70; R454 at 143-44.] All of Hurst's meetings with Heaton at Steelco's premises were clandestine -- Hurst's conduct led Steelco's personnel to believe that Hurst was only a social acquaintance. [R450 at 68-70; R452 at 25-26, 79-80.] On those occasions when Steelco's trucks were involved in deliveries to Wasatch Steel, Hurst and Wasatch Steel arranged to cut checks to Steelco for a small portion of the material and to Heaton for the other portion, misleading Steelco to believe that it was being paid for all of the steel that its trucks and employees removed from Steelco's premises. [R451 at 4-5.] With respect to the kickback transactions, Heaton always told Hurst that Steelco was not to know about these arrangements and Hurst agreed to keep the arrangement secret. [R451 at 23-24, 31-32.] Hurst never spoke to Steelco's management about the kickbacks that he paid to Heaton and Chris Williams, even though, by his own testimony, at the time he paid the kickbacks, he thought it was a "sleazy" practice and that he would have immediately fired one of his own

employees if they had received a kickback under the same circumstances. Although the foregoing is plainly sufficient, additional evidence of fraudulent concealment is discussed below at pages 57-61.

III. THE COURT'S FINDINGS ARE SUPPORTED

A. The Trial Court Properly Entered its Findings Which are Entitled to a Presumption of Propriety. At pages 44-47 of their brief, defendants suggest that counsel, and not the court, found the facts in this case, that the court was unilaterally hostile towards defendants, and that the trial judge abandoned his duties as a judge to find for plaintiffs. Defendants are wrong as a matter of law and as a matter of fact.

1. Standard of Review. Rule 52(a) provides in part that "findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A finding is clearly erroneous only if this Court concludes that the finding is against the great weight of evidence. Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989). The reviewing court accords the trial court substantial deference to determine the credibility of the witnesses. State v. Wright, 744 P.2d 315 (Utah App. 1987).

2. The Trial Court Showed no Hostility to Defendants. A review of the record cited in defendants' brief will make crystal clear that defendants are misleading this Court as to their claim of hostility. Prior to the court's statement to Mr. Garrett that "well, I have made my judgment, Mr. Garrett," which defendants suggest constitutes hostility, Mr. Garrett stated to the court:

> Perhaps, Your Honor would not care to hear this, but I was astonished that Your Honor would accept the testimony of Chris Williams. It was totally unbelievable in my judgment. [R455 at 13; Defendants' Brief at 46, n.6.]

Defendants complain that the trial court expressed concern that, after Lynn Hurst testified under oath in his deposition that all of his cash records had been stolen, he nevertheless was able to locate the same cash records to offer into evidence. [R454 at 127-28; Defendants' Brief at 46, n.6.] Defendants' claim of trial court hostility is devoid of support.

3. The Trial Court Made its Findings Based Upon Clear and Convincing Evidence. In its Memorandum Decision, the court stated that it found by a "preponderance of the evidence" the facts. The findings ultimately entered by the court were based upon clear and convincing evidence. Defendants claim some error in this procedure. Prior to the court's entry of its findings, the court held a hearing to address that and related issues. At that hearing, the court stated as follows:

> In this particular case, as I just sat in there and dictated, I did in fact, as I reviewed my Memorandum Decision, it is true it stated that I was finding from a preponderance of the evidence. It is amazing because I usually never say one way or another and I don't know why those words rolled up. But there is no question in my mind that I made my findings based upon clear and convincing evidence, and therefore the words I used in that regard, in regards to certain of those findings, really that memorandum must be amended because that was not what I intended and my findings were based upon clear and convincing evidence. [R455 at 2.]

Thereafter, the court entered the findings, based upon clear and convincing evidence. Defendants' request that this Court find error in the standard applied by the trial court requires that the trial court be disbelieved.

4. The Court Made its own Findings. At pages 44-47 of their brief, defendants inaccurately suggest that the trial court mechanically adopted findings submitted by plaintiffs' counsel. The Supreme Court addressed the entry of findings in Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977). In that case, plaintiffs on appeal asserted that the trial court erred in "adopting the findings of fact as prepared by the defendant without any modification or change." Id. at 1113. The Supreme Court stated:

> The court may ask counsel to submit findings to aid the court in making the necessary findings for the particular case. While we do not recommend that the trial judge "me-

> chanically adopt" the findings as prepared by the prevailing party, we certainly do not find such to be the fact in this case. After the proposed "findings" were submitted by defendants' counsel, the plaintiff filed objections and proposed amendments which were argued before the trial court who ultimately adopted the findings as submitted. The discretion of adopting the findings as submitted to the trial court is exclusively in that court as long as the findings are not clearly contrary to the evidence. We find no error in this regard. Id. at 1113-14.

The trial court in this case did far more in preparing findings than did the trial court in the Boyer case. After trial, the court entered an unusually detailed nine page Memorandum Decision containing 27 numbered findings. [R273.] In those findings, the court found each material element to the defendants' liability under three theories and rejected liability under two theories. At paragraph 27, the court stated that its decision was not intended to include all necessary findings and directed plaintiffs' counsel to prepare findings, conclusions, and a judgment and "in doing so will add those additional facts, established by the evidence, that are supportive of this Memorandum Decision."

Plaintiffs' counsel then submitted proposed Findings of Fact and Conclusions of Law to the court. Defendants then filed 39 pages of objections to those findings, which in the main consisted of their disagreement with the court's decision. [R283.] The court later held a hearing at which the parties argued their respective positions on the findings and con-

clusions. [R455.] The court thereafter entered an order rejecting defendants' objections and amending its Memorandum Decision to state that the court had made its findings by clear and convincing evidence. [R376.]

Judge Russon did not mechanically adopt anything. The findings were his own.

B. Defendants Have Improperly Challenged the Court's Findings. As indicated above in section II.A., when an appellant fails to marshal the evidence, the appellate courts have refused to consider the merits of challenges to the findings and have accepted them as valid. Defendants' challenge to the court's findings generally presents only testimony that was disbelieved by the trial court, that tends not to support the trial court's findings, and that lacks citations to the record. Defendants' clear failure to marshal the evidence should result in this Court's refusal to consider defendants' challenge.

Defendants' challenge to the trial court's findings requires that the trial court believe Lynn Hurst and disbelieve virtually every other witness in one respect or another. Mr. Hurst, who repeatedly bribed Steelco's employees, who lied in his deposition saying that all of his cash records had been stolen to avoid producing them for Steelco's inspection, who testified at trial to the opposite of what he testified to in his deposition, again and again, and who, while under oath at trial, testified that he

approves of the practice of paying kickbacks, is a person that, we submit, should not be believed. The trial court obviously did not believe him.

C. The Court's Findings are Supported. At pages 48-61 of their brief, defendants challenge four of the court's findings, each of which is addressed in turn below.

1. Defendants Knew of the Fraud and Conspiracy. Both the court's Memorandum Decision and the Findings of Fact that were ultimately entered specifically found that defendants knew of the fraud that was being perpetrated upon Steelco. At pages 48-50, defendants challenge that finding.

Defendants suggest at pages 49-50 that two quotations from Heaton's testimony establish that Heaton and Hurst never discussed the fact that the steel was stolen. In the first quotation, which is indented, Heaton indicated only that when he first started dealing with Hurst, Heaton indicated that he was buying and reselling the steel to him. Defendants' statement that Heaton again affirmed that the subject was never brought up again is inaccurate.

The statement of facts above sets forth the evidence establishing that defendants had knowledge of the fraud being perpetrated upon Steelco. That evidence included evidence that Heaton repeatedly reminded Hurst that his deliveries of stolen steel were to be kept secret and Hurst agreed to secrecy. It is

implausible to believe that Hurst thought his dealings with Heaton were aboveboard when Heaton went to great lengths to keep their dealings private, when Hurst misled Steelco employees to believe that Hurst was a personal friend, and when Hurst never dealt with anyone at Steelco other than Heaton.

The purchase and delivery process were suspicious in the extreme. Virtually all deliveries were after Steelco's hours. Hurst picked out the remnants he wanted from Steelco's remnant racks and paid only a fraction of their value for them. A person in the steel business would know that the remnant was used by Steelco and was not for sale. Wasatch Steel paid both Steelco and Heaton for exactly the same kinds of materials in the amounts directed by Heaton even though all of the steel came from Steelco. There is no rational explanation why Steelco would sell part and Heaton would sell part of a series of loads -- Hurst's splitting the payments between Steelco and Heaton on loads involving Steelco personnel was an obvious effort to mislead Steelco into believing that it was being paid for its steel.

Defendants' position on appeal is premised almost exclusively upon their claimed reliance upon Heaton as an all powerful supervisor of Steelco's shop. Defendants claim that they were convinced of Heaton's bona fides and of his authority to be paid for huge amounts of steel removed from his employer's premises over an extended period of time is beyond comprehension,

when Hurst was concurrently bribing Heaton to defraud his employer. Hurst's own admission that, at the time he paid the kickbacks, he thought it was a "sleazy practice" and that Heaton's request for the commission caused his view of Heaton's integrity and honesty to drop is of crucial significance. Hurst himself testified that he was paying Heaton a kickback to cause Steelco to purchase "rough material" -- junk. Nevertheless, Hurst did not advise Steelco of this fact, Hurst never inquired about Heaton's authority to be paid, individually, for huge amounts of steel removed over an extended period from Steelco's premises, and Hurst materially participated in the concealment of the fraud.

When Steelco first discovered Heaton's thefts and approached Hurst for assistance in determining their extent, Hurst did not react like an honest businessman. He insisted on speaking to his attorney first and then, before talking to Elkington, he and Heaton got their stories straight. Heaton told Elkington that he delivered less than $10,000 worth of scrap to Hurst and Hurst confirmed that phony number. Hurst withheld records from Elkington and the only records Elkington saw were those handpicked by Hurst, which had to be pried out of Hurst year by year. Although Hurst knew that Elkington was investigating the nature and extent of Heaton's improper activities, and Hurst admitted that it would have been important for Elkington to

know about the kickbacks, Hurst never told Elkington about the kickbacks. [R454 at 157.]

It is doubtful that many defendants candidly admit their knowledge and participation in fraudulent activities. All of the evidence other than Mr. Hurst's version of things, however, convincingly points to Hurst and Wasatch Steel's knowledge of and affirmative participation in a scheme to defraud Steelco through purchasing its stolen steel at bargain prices and inflating the prices paid by Steelco for materials sold by Wasatch Steel through the kickback scheme.

2. There was a Conspiratorial Agreement. At pages 51-52, defendants, again without marshaling the evidence, argue that the evidence does not support the existence of a conspiracy agreement, which the court found in both its Memorandum Decision and its Findings. As the Court stated in Israel Pagan Estate v. Cannon, 746 P.2d 785, 791 (Utah App. 1987), "it is not necessary in a civil conspiracy action to prove that the parties actually came together and entered into a formal agreement to do the acts complained of by direct evidence. Instead, conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators." With respect to kickbacks, the arrangement was clear and express: Both Volma Heaton and Chris Williams testified that Hurst would quote a price which

would then be inflated by agreement depending upon how much of a kickback was to be paid. The parties' agreement that Wasatch Steel would accept stolen steel and pay a low price for it can be inferred from their having done so for years, from their obvious efforts to keep the arrangement secret, from their cooperative efforts to conceal the thefts and resales from Steelco's management, from Hurst's knowledge of the fact that the steel was stolen, from Hurst's lying to Elkington about the unavailability of part of his records, and from Hurst's and Heaton's agreement to confirm to Elkington a phony, reduced amount of steel that was purchased by Wasatch Steel.

3. Heaton had no Actual or Apparent Authority to Steal. At pages 52-56, defendants argue that Heaton was clothed by Steelco with actual or apparent authority to act as he did. Both the court's Memorandum Decision and the Findings of Fact found that Heaton had no actual or apparent authority to sell remnant steel to Wasatch Steel. Since the court found that Hurst and Wasatch Steel knew that Heaton was stealing from Steelco the material that he was reselling to Wasatch Steel, it is self-evident that the defendants did not rely upon any "apparent authority" of Heaton in their dealings with him. It is mystifying how defendants can ask this Court to believe that they relied upon the bona fides of a man to whom they were regularly paying bribes.

The doctrine of apparent authority is not even applicable here. If Steelco led Hurst to believe that Heaton was authorized to sell the steel, then Hurst should have been writing checks to Steelco and the doctrine of apparent agency might vaguely apply to this case. Agency is not an issue in this case -- Hurst does not even claim he was dealing with Steelco.

Even if the doctrine of apparent authority had application here, it requires that the principal lead third parties to believe that the agent has authority to bind the principal. Bank of Salt Lake v. The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (Utah 1975). The court found that Steelco did nothing to mislead defendants about Heaton's authority. Implied authority, about which defendants also speak, merely affords an agent implied authority to do the natural and ordinary incidents of what is expressly authorized. Bowen v. Olsen, 576 P.2d 862 (Utah 1978). Here, it is uncontested that Heaton was not expressly authorized to sell steel to third parties or, more obviously, to steal steel from his employer.

This section of defendants' brief is a self-serving, misleading, and inaccurate recitation of facts and events. Many, if not most, of defendants' statements have no record support or citation. Defendants, who admit bribing a Steelco employee to defraud his employer, assert that "Defendants' dealings with

Steelco were entirely consistent with normal business practices. There is nothing unusual or improper in Mr. Hurst's dealing with plaintiffs' Superintendent. . . ." Another example is defendants' statement that others made purchases from Heaton "without suspecting any lack of authority." Although others surely purchased from Heaton, the remainder of the statement is devoid of record support.

The court's finding that Steelco did nothing to clothe Heaton with authority to deal as he did with defendants is supported by the record. At pages 7-12 of the statement of facts of this brief are set forth some of the evidence supporting that finding.

4. Defendants' Characterization of the Kickbacks is Inaccurate. At pages 56-57, defendants distort and misrepresent the record on the subject of the kickbacks. An accurate description of the kickback transactions is found at pages 14-21 of the statement of facts section of this brief. The trial court found that Hurst paid Volma Heaton eight kickbacks totaling in excess of $4,000 and, in addition, paid Chris Williams multiple kickbacks in an amount aggregating $5,700. Defendants' statement that there were only four kickbacks is inaccurate. Defendants state that Elkington did not see records disclosing the kickbacks when he asked Wasatch Steel for this information because he did not ask to review the check register. That is not true and the

record does not support that statement. Even though Elkington asked Hurst about the unlawful activities of Heaton, Hurst did not disclose that he had been paying bribes to Heaton, one as recently as two months prior to Elkington's visit.

Defendants argue that the "ballast" steel, upon which some of the kickbacks were paid, needed no special appearance, served its intended purpose, was competitively priced, and that as a result Steelco suffered no loss. The court's findings, and the evidence, are that the junk that Hurst peddled using his bribery scheme did not fulfill the requirements for ballast, required huge amounts of extra labor to prepare it for its intended use, and that over 30,000 pounds of the stuff is still sitting in Steelco's yard, unused and unusable.

Wasatch Steel's self-serving recitation in this portion of its brief leaves the reader with the impression that Mr. Hurst is on the verge of sainthood. As has been demonstrated, the testimony of Mr. Hurst, alone, is sufficient to establish his commission of the crime of bribery.

5. Hurst Paid Chris Williams Kickbacks. In both its Memorandum Decision and Findings, the court found that Hurst paid Chris Williams multiple kickbacks. Again, defendants have made no effort to marshal the evidence, as they must, but instead have advanced a self-serving, incomplete, and inaccurate recitation of the evidence.

As Chris Williams candidly admitted during her testimony, she was a drug user during her employment in Steelco's purchasing department and stole money to support her habit. Steelco fired her in June of 1986 for stealing cash. In October of 1987, she checked herself into Highland Ridge Hospital for five weeks and, except for one use of drugs on November 27, 1988, Chris has not used alcohol or drugs at any time since. [R451 at 155-57.] She is presently an active member of Alcoholics Anonymous. [R451 at 157.] Two years after she was fired, Chris voluntarily returned to Steelco and advised Elkington of all of her unlawful activities, of which Steelco was previously unaware. Very significantly, at the time she so informed Steelco, Steelco was ignorant of any kickbacks being paid to anyone. Heaton had not informed Steelco of his kickback arrangement. Williams advised Elkington that Heaton had told her of his kickback arrangements with Hurst which in turn prompted Williams to engage in the same activity. It is absolutely inconsistent that Williams would fabricate her receipt of kickbacks when (i) she had no motive to do so and (ii) she was the first person to advise Steelco of the kickback arrangements, which have since been fully corroborated by both Mr. Hurst and Mr. Heaton.

All of Heaton, Williams, and Midgley testified that Hurst knew and dealt with Chris Williams. Hurst testified that he had never seen her prior to her deposition in this case.

Defendants suggest that there is nothing in Wasatch Steel's records to show any kickbacks to Chris Williams. That is not surprising, for three reasons. First, Chris Williams testified that Hurst paid her kickbacks in cash; Heaton's kickbacks were paid with checks, thereby leaving a record. Second, Wasatch Steel's cash records were first completely stolen and then selectively reappeared. Hurst testified in his deposition that "all" of his cash records relating to the period during which Williams received her kickbacks were stolen, although at trial he conveniently located a few "stolen" records to serve his own evidentiary purposes. The date of the alleged theft was very shortly after Elkington began his investigation into Wasatch Steel's activities. Hurst's bookkeeper, from whom he testified the records were stolen, was not called as a witness at trial. The absence of Wasatch Steel's cash records concerning kickbacks paid to Williams is not at all surprising. Third, whereas Heaton was paid kickbacks by Wasatch Steel checks, in the case of Chris Williams, the cash kickback amount was split between Williams and Hurst. After agreeing with Hurst on an amount by which the usual price of the goods would be jacked up, Hurst and Williams would split the difference. [R451 at 152-53.] Hurst, himself, received approximately 20% of the difference in cash. [R451 at 187-91.] Hurst may not have wanted to keep a record of his

activities since he, himself, may have been defrauding Wasatch Steel by personally receiving these cash payments.

Defendants correctly indicate that, shortly before trial, Ms. Williams destroyed her diary, which contained a record of the kickbacks that were paid to her. Williams prepared another document summarizing the inappropriate financial dealings while at Steelco which were contained in her diary. [R451 at 146-47.] Chris Williams testified that she threw away her personal diary because "that is in my past now. I didn't want to bring that up. I don't need to look at that anymore. I threw my diaries away." [R451 at 160-61.] The lost diary is understandable and of no significance.

As they did in their statement of facts, defendants at page 58 of their brief attempt to discredit Chris Williams' testimony by attempting to show mathematical disparities in the kickback transactions. As indicated in the statement of facts above, however, these disparities exist only if Chris Williams was paid the exact amounts on the three exact transactions identified by defendants, and no others. Chris Williams did not so testify. She was sure only of the total amount received in kickbacks -- she was understandably unsure of the exact transactions on which she was paid, the exact amounts involved in any transaction, the exact period of time during which the kickbacks were paid, or the exact number of kickbacks that she was paid.

Chris Williams' testimony needs no corroboration, but even if it did, it is corroborated by Hurst and Heaton's testimony that Hurst was regularly paying bribes to Steelco's employees, a fact that Chris Williams was the first to disclose to Steelco. It is also corroborated by Lynn Hurst's offering false testimony during his deposition that all of the cash records that may have evidenced these commissions were stolen. It is also corroborated by the fact that although each of Chris Williams, Heaton, and Patty Midgley testified that Hurst knew and dealt with Chris Williams, Hurst denied ever having seen her prior to her deposition. If Hurst is lying about having never seen Chris Williams, he is just as surely lying about not having paid bribes to her, just as he did regularly with Heaton.

6. The Court's Findings on Conversion are Supported. At pages 60-61 of their brief, defendants suggest that (i) Heaton was entitled to receive some of the steel that he sold and (ii) Heaton's apparent authority precludes conversion. With respect to the first point, the trial court clearly delineated the materials that were given to Heaton from those that Heaton stole, and plaintiffs were not awarded damages with respect to the materials that were Heaton's to sell. The court's findings and the evidence supporting those findings is set forth at pages 12-14 of the statement of facts above. On the authority issue, it has already been demonstrated that Heaton had no such author-

ity, and, in any event, defendants knew that the steel was stolen. Even if they did not, however, under established Utah law, even a party innocently purchasing from a thief is liable in conversion.

The intent required for conversion is not any wrongful intent; rather, the defendant need only intend to exercise a dominion or control over the goods -- that is, if Wasatch Steel intended to take possession of and resell the goods, the intent element is fulfilled. That fact is uncontested.

> A purchaser of stolen goods or an auctioneer who sells them in the utmost good faith becomes a converter, since his acts are an interference with the control of the property. W. Prosser, Law of Torts at 83 (4th Ed. 1971).

In Allred v. Hinkley, 328 P.2d 726 (Utah 1958), the Supreme Court addressed conversion in the context of a party's receipt of stolen property. There, seed growers delivered seed to one Malin, who without their authority sold the seed to Union Seed Company. The growers sued the seed company for conversion. The Supreme Court stated as follows:

> Although conversion results only from intentional conduct it does not require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right. A purchaser of stolen goods or an auctioneer who sells them in good faith becomes a converter since his acts are an interference with the control of the property or in other words, a claiming of the ownership in such

> property and taking it out of the possession of someone else with intentions of exercising dominion over it is a conversion. Thus, a bona fide purchaser of goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods. Id. at 728.

The Allred case is indistinguishable from this case -- even assuming that Steelco entrusted portions of the steel to Heaton's care and that by virtue of his position at Steelco Heaton had apparent authority to sell the steel, he nonetheless lacked actual authority and, accordingly, Wasatch Steel's purchases amounted to a conversion, regardless of defendants' good faith. Just this year, the Supreme Court affirmed its Allred holding in Phillips v. Utah State Credit Union, 811 P.2d 174, 179 (Utah 1991).

Defendants' argument necessarily rests upon the proposition that a good faith purchaser should not be liable for conversion. The courts have unanimously held that a purchaser's good faith or knowledge is irrelevant to a cause of action for conversion. Matter of 1969 Chevrolet, 656 P.2d 646 (Ariz. App. 1982); Moore v. Regents of University of California, 249 Cal. Rptr. 494 (Cal. App. 1988); Klam v. Koppel, 118 P.2d 729 (Idaho 1941); Nelson v. Hy-Grade Constr. & Materials, Inc., 527 P.2d 1059 (Kan. 1974); Bader v. Cerri, 609 P.2d 314 (Nev. 1980); Jeddkins v. Sadler-MacNeil, 376 P.2d 837 (Wash. 1962); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977). The two cases cited by

defendants are inapposite. They concern a partner's authority to bind a partnership and whether a corporation's general manager had authority to bind the corporation. Here, it is undisputed that Volma Heaton did not have authority to steal and resell his employer's products.

IV. THE MEASURE AND CALCULATION OF DAMAGES WAS APPROPRIATE

A. The Amount of Damages Awarded was Correct. At pages 61-63, defendants argue that the court applied a retail value measure of damages for the conversion claim, which was inappropriate. As defendants concede, the court awarded to Steelco the amount that Wasatch Steel received on resale for the goods that were stolen from Steelco. The Utah Supreme Court has on multiple occasions indicated that the measure of damages for a conversion is the "value" of the property at or near the time of conversion. Murdock v. Blake, 484 P.2d 164 (Utah 1971); Lowe v. Rosenlof, 364 P.2d 418 (Utah 1961). "Value" or "market value" is the retail, not the wholesale value of the goods. In Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988), the Court stated as follows:

> The measure of damages for conversion when property is not returned is the value of the property at the time of the conversion, plus interest. * * * Market value is defined as the price for which the property is bought and sold at retail in the marketplace or, in the case of unique property, the value to the owner. Id. at 468.

The Henderson Court relied in part upon the case of Winters v. Charles Anthony, Inc., 586 P.2d 453 (Utah 1978), in which the Supreme Court stated that the measure of value for the loss of personal property is the price for which the article is bought and sold in the marketplace, "and the legal definition of that price is retail, not wholesale." Id. at 454. Defendants argue that, although retail is the proper measure in a consumer context, wholesale is the proper measure when the plaintiff is a dealer in the goods converted. In Allred v. Hinkley, 328 P.2d 726 (Utah 1958), the farmers were allowed to recover the difference between the price paid by the purchaser, Union Seed Company, and the price they actually received from Malin -- thus, the damage award was based on sales price, not the cost of replacement. Similarly, in Lowe v. Rosenlof, 364 P.2d 418 (Utah 1961), the Court held that the appropriate measure of damages is the "market value" of the forms converted, not the replacement cost. Id. at 421-22.

Here, the "market value" adopted by the court was, as defendants admit, based upon Hurst's own testimony as to that "value" -- the amount that he could resell the goods for. Whether that measure is "market value," for which Hurst sold the goods, or "retail value" is irrelevant. The Restatement (Second) of Torts §927 comment i (1977) provides:

> If the converter has disposed of the chattel, the owner, in addition to his other rights, can elect to recover the value of the chattel at the time of the disposition, from the seller. . . .

Illustration 11 of this section is as follows:

> A, bailee at will for B, wrongfully sells to C for $1,000 bailed commodities then worth $1,200. Knowing the facts, C sells them for $1,300 to D. . . . When B discovers the facts, the commodities have a value of $800. B is entitled to recover $1,200 from A, or $1,300 from C. . . . Restatement (Second) of Torts §927 illustration 11 (1977).

This illustration is directly on point. A would be Heaton, B would be Steelco, and C would be Wasatch Steel. Applying that illustration, Wasatch Steel should be required to disgorge the amount it received from the sale of the converted property. In Simmons, Inc. v. Pinkerton's, Inc., 762 F.2d 591 (7th Cir. 1985), the defendant, like appellants here, relied upon Section 911 of the Restatement as authority that the wholesale price, not the sale price, is the proper measure of damages. The Court rejected this argument, reasoning that "[t]he profit margin is part of the value as inventory, even though, like the rest of the price, it is not realized until sale." Id. at 606-07. Wasatch Steel by resale established market value, and under all authorities, Steelco is entitled to recover that market value.

Even if this Court were to reject the measure of damages applied by the trial court for conversion, the lower court, with

respect to fraud and conspiracy, found the value of the very same materials based upon the amount that Steelco was required to pay to replace the material. [Finding of Fact ¶60; R358; R452 at 168-71.] Thus, even if the Court adopts defendants' view of the measure of damages, the trial court has already found the amount of Steelco's damages based upon the measure of damages advocated by defendants, and no retrial is necessary.

B. The Court's Damage Findings Were Correct. At pages 63-66 of their brief, defendants pursue their standard practice of ignoring all of the evidence supporting the court's findings, inaccurately stating the evidence favorable to themselves, and failing to advance record support for the statements lacking such support. As the statement of facts above reveals, Wasatch Steel purchased only remnant, not scrap, from Heaton. As Hurst, himself, testified, Wasatch Steel resold what it purchased from Heaton for double what was paid to Heaton. The remnant steel that was stolen was in the main taken from remnant racks, where it was placed to be reused, as new steel, in Steelco's fabrication operation. The remnant material was worth as much to Steelco as new steel -- the pieces were just smaller. The uncontested facts are that Heaton stole remnant material from Steelco and that the remnant material had the same value to Steelco as new steel. The court so found, and the record supports that finding. The court awarded to plaintiffs under their

conversion theory the amount that, according to Hurst, Wasatch Steel sold the material for. Under Steelco's fraud and conspiracy theories, the court awarded to Steelco the value of the goods stolen to Steelco -- based upon the amount that Steelco would be required to pay to purchase the very same goods. There is neither mystery nor distortion in the trial court's finding as suggested by defendants.

C. The Court's Award of Attorney's Fees was Appropriate. At pages 66-67 of their brief, defendants argue that there was no legal basis for the award of attorney's fees here. Whenever exemplary damages are awardable, attorney's fees are properly awardable. DeBry & Hilton Travel v. Capitol Int'l Airways, 583 P.2d 1181, 1185 (Utah 1978). As will be demonstrated in the section that follows, exemplary damages are appropriate, and so also is an award of attorney's fees.

D. Punitive Damages are Appropriate Here. In Atkin Wright & Miles v. The Mountain States Telephone and Telegraph Co., 709 P.2d 330 (Utah 1985), the Supreme Court stated the standard for recovery of punitive damages: "[P]laintiff must prove conduct that is willful and malicious . . . or that manifests a knowing and reckless indifference and disregard toward the rights of others." Id. at 337; Crookston v. Fire Ins. Exchange, 164 Utah Adv. Rep. 3 (Utah 1991). In two Utah cases, the Court in a conversion context has sustained punitive damage awards when the

defendant's conduct was knowing. Kesler v. Rogers, 542 P.2d 354 (Utah 1975); First Security Bank v. J.B.J. Feedyards, Inc., 653 P.2d 591 (Utah 1982).

We are not here dealing with a jury gone wild. Judge Russon, a respected judge, heard all of the evidence and himself made detailed findings in his Memorandum Decision which included findings that defendants' actions "were willful and made with reckless disregard to the rights of others, and punitive damages are, therefore, appropriate. Punitive damages are for the purpose of punishment, and a deterrent and warning to defendant and others that such behavior will not be tolerated by society." [R278.] As has been amply demonstrated above, defendants' conduct, including conspiring to defraud Steelco of vast quantities of stolen steel and payment of multiple bribes to multiple employees of Steelco, amply support an award of punitive damages in this case. By Hurst's own testimony, he knew what he was doing was wrong and a sleazy, dishonest practice. Hurst continued to pay kickbacks and receive stolen steel at bargain prices, however, because he could not have cared less about Steelco's legitimate rights -- he was too busy making money from his sleazy dealings with Steelco's dishonest employees. What we have here is a company which obviously did not care about what was right of wrong -- Wasatch Steel and Hurst cared only about what they could get away with. But for the existence of the

Wasatch Steels and Lynn Hursts of the world, people with drug problems would have difficulty selling their stolen goods, and dishonest employees would have difficulty defrauding and stealing from their employers. Hurst and Wasatch Steel, through their indifference towards the law and the rights of Steelco, allowed this pervasive fraud to go on for in excess of four years -- until a recovering drug abuser who decided to make a clean break of it told the truth. But for Steelco's independent discovery of Heaton's thefts and Chris Williams' commendable conduct of coming forward with the truth, Hurst and Wasatch Steel would undoubtedly still be paying kickbacks to Steelco's employees and purchasing steel stolen from Steelco's premises. Exemplary damages are required here.

In fixing the amount of punitive damages, the finder of fact must consider (i) the nature of defendant's acts, (ii) the probability of those facts being repeated in the future, and (iii) the relative wealth of defendant. Terry v. Zions Cooperative Mercantile Inst., 605 P.2d 314 (Utah 1979). The trial court considered each of those factors in arriving at its exemplary damage award of $100,000. [R353 ¶52.]

A punitive damage award will be affirmed unless it appears that the award "has resulted from passion or prejudice rather than reason and justice." First Security Bank v. J.B.J. Feedyards, Inc., 653 P.2d 591, 599 (Utah 1982). Here, the nature of

defendants' acts is reprehensible. The probability of those acts being repeated in the future is unquestionably good, since Wasatch Steel's business is conducive of receiving stolen property and Lynn Hurst has told the court that he sees nothing wrong with kickbacks. The relative wealth of defendants is the remaining consideration.

Wasatch Steel's relative wealth is demonstrated through Exhibits 49-P and 50-P. Those financial records, which were prepared by Wasatch Steel specifically for trial, no doubt understate or at least conservatively state the wealth of Wasatch Steel. Even so, Exhibit 49-P reflects a net worth of Wasatch Steel in the amount of $461,087.07. That substantial figure would, according to Hurst's own testimony, be increased by at least a good part of the accumulated depreciation amount of $145,331.55 shown on page 1 since he testified that the value of the company's assets was as shown on the balance sheet without regard to depreciation. [R454 at 24-26.] In addition, that net worth figure includes a downward adjustment of an unexplained "prior period adjustment" in the amount of $63,281.98 shown on the second page. With respect to Exhibit 50-P, Hurst admitted that Wasatch Steel makes about $9,000 per month in clear profit, and that is even after the owners are furnished with their multiple fringe benefits. Even at a conservative $9,000 per month profit figure, Hurst testified that the business might be

worth a million dollars. [R454 at 32-33.] Hurst owned 15% of Wasatch Steel.

Thus, the hundred thousand dollar punitive damage award can be viewed as eleventh months of Wasatch Steel's profits or one-tenth of Wasatch Steel's net worth. Steelco's actual damages, exclusive of interest, are more than three-quarters of the punitive damage award amount. If interest is considered, actual damages exceed the punitive damage award.

The court has recently sustained multiple punitive damage awards in the range of this one, where punitive damages range from one-half to twice the amount of actual damages. Synergetics v. Marathon Ranching Co., Ltd., 701 P.2d 1106 (Utah 1985); Von Hake v. Thomas, 705 P.2d 766 (Utah 1985); First Security Bank v. J.B.J. Feedyards, Inc., 653 P.2d 592 (Utah 1982). The exemplary damage award by the court in this case is well within the guidelines established by the Supreme Court's recent opinion in Crookston v. Fire Ins. Exchange, 164 Utah Adv. Rep. 3 (Utah 1991). There, the Court held that where the punitive damage award is less than $100,000, an award is not excessive "when punitives do not exceed actual damages by more than a ratio of approximately three to one." Id. at 13.

In this case, multiple factors justify the exemplary damage award and its amount. First, the award was created by a thoughtful judge, not an impassioned jury. Second, defendants' conduct

was particularly reprehensible. Defendants' knowing, intentional, fraudulent behavior systematically occurred over an extended period of time and involved conduct rising to the level of criminal activity -- knowing receipt of stolen property and bribery. Third, as the record in this case amply demonstrates, Wasatch Steel's controlling personality, Lynn Hurst, is a palpable liar who testified at trial that he had no problem with kickbacks. Fourth, the amount of the punitive damage award is reasonable in relation both to the actual damages sustained by Steelco and the wealth of defendants. The award is appropriate and should be sustained.

CROSS APPEAL

V. STEELCO IS ENTITLED TO RECOVER UNDER THE RACKETEERING ACT

The trial court found that Steelco did not prove its claims under the Racketeering Enterprises Act, Utah Code Ann. §§76-10-1601, et seq. (the "Act") because Wasatch Steel and Hurst engaged only in three or more episodes of unlawful activity involving only one victim, Steelco -- the trial court held that the Act requires proof of episodes of unlawful activity involving three separate victims. [R279 at 25; R359 at 62.] The trial court found all other elements of defendants' liability under the Act.

Section 76-10-1605 of the Act provides for a private remedy as follows:

> (1) A person injured in his person, business, or property by a person engaged in conduct forbidden by any provision of Section 76-10-1603 may sue in appropriate district court and recover twice the damages he sustains, regardless of whether: (a) the injury is separate or distinct fr(the injury suffered as a result of the acts or conduct constituting the pattern of unlawful conduct alleged as part of the cause of action; or (b) the conduct has been adjudged criminal by any court of the state or of the United States.
>
> (2) A party who prevails on a cause of action brought under this section recovers the cost of the suit, including a reasonable attorney's fee.
>
> * * *
>
> (4) In all actions under this section, a principal is liable for actual damages for harm caused by an agent acting within the scope of either his employment or apparent authority. A principal is liable for double damages only if the pattern of unlawful activity alleged and proven as part of the cause of action was authorized, solicited, requested, commanded, undertaken, performed, or recklessly tolerated by the board of directors or a high managerial agent acting within the scope of his employment.

Thus, the predicate for liability under the Act is a violation of Section 76-10-1603, which in turn provides as follows:

> (1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity in which the person has participated as a principal, to use or

> invest, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise.
>
> (2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.
>
> (3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.
>
> (4) It is unlawful for any person to conspire to violate a provision of Subsections (1), (2) or (3).

Section 1603, then, requires that the defendant engage in a "pattern of unlawful activity." That phrase is defined in Section 76-10-1602(2) as follows:

> (2) "Pattern of unlawful activity" means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise. At least one of the episodes comprising a pattern of unlawful activity shall have occurred after July 31, 1981. The most recent act constituting part of a pattern of unlawful activity as defined by this part shall have occurred within five

> years of the commission of the next preceding act alleged as part of the pattern.

That section, in turn, is predicated upon the commission of episodes of "unlawful activity," which is defined in turn in Section 76-10-1602(4):

> (4) "Unlawful activity" means to directly engage in conduct or to solicit, request, command, encourage, or intentionally aid another person to engage in conduct which would constitute any offense described by the following crimes or categories of crimes, or to attempt or conspire to engage in an act which would constitute any of those offenses, regardless of whether the act is in fact charged or indicted by any authority or is classified as a misdemeanor or felony: * * * (k) theft, Section 76-6-404; * * * (n) receiving stolen property, Section 76-6-408; * * * (s) bribery or receiving bribe by person in the business of selection, appraisal, or criticism of goods, Section 76-6-508.

The trial court found each required element to defendants' liability under the Act:

1. Injury to plaintiff's business or property [Section 76-10-1605]. See Findings of Fact ¶¶16, 17, 30, 41, 45 [R335, et seq.].

2. Use of proceeds of unlawful activity in the establishment or operation of a business or participate in a business's affairs through a pattern of unlawful activity (pattern of unlawful activity being described below under paragraph 3) [Section 76-10-1603]. See

Findings of Fact ¶¶14, 15, 32, 33, 34, 35 [R335, et seq.].

3. Participation in at least three episodes of similar or related conduct for financial gain involving

a. Theft [Section 76-6-404]. See Findings of Fact ¶¶14, 15, 20, 26 [R335, et seq.].

or b. Receiving stolen property [Section 76-6-408]. See Findings of Fact ¶¶14, 15, 26 [R335, et seq.].

or c. Bribery [Section 76-6-508]. See Findings of Fact ¶¶31, 32, 33, 34 [R335, et seq.].

or d. Aiding or soliciting any of the foregoing. [Section 76-10-1602(4)]. See Findings of Fact ¶¶14, 42 [R335, et seq.].

or e. Conspiring to commit any of the foregoing [Section 76-10-1602(4)]. See Findings of Fact ¶¶14, 42 [R335, et seq.].

4. One episode must occur after July 31, 1981 and another within five years of the next preceding episode [Section 76-10-1602(2)]. See Finding of Fact ¶10, Exhibit 27-P, Finding of Fact ¶32 [R335, et seq.].

Thus, the trial court found each and every element required to subject defendants to liability under the Act. The trial court erred in construing Section 76-10-1602(2) to require three

separate episodes of unlawful activity involving separate victims. There is no basis in the language of that section to infer such a requirement; indeed, the section suggests the opposite interpretation. Section 76-10-1602(2) requires that the episodes "have the same or similar purposes, results, participants, victims, or methods of commission. . . . Taken together, the episodes shall . . . be related either to each other or to the enterprise." In this case, as the court found, Hurst, Williams, and Heaton ("similar participants") systematically engaged in multiple briberies and thefts ("similar methods of commission and results") involving Steelco (the "same victim") -- a classic racketeering offense.

Since the trial court found each element to defendants' liability under the Act, Steelco is entitled to judgment against defendants, jointly and severally, in the amount of $211,480.66 as shown on Exhibit 32-P, interest on the doubled principal amount thereof, and Steelco's attorney's fees, which the court found to be $35,850. Exhibit 32-P is merely a summary of the losses suffered by Steelco as a result of the thefts of its steel and kickbacks (the dollar amounts of which were specifically found by the trial court as paragraphs 17, 30, and 41 of its Findings of Fact), which doubles the damage amounts as prescribed by the Act. Steelco is entitled to the substitution of its greater recoverable damages under the Act for the damage amounts

awarded in paragraphs 1 and 2 of the Judgment relating to the stolen steel and kickbacks. Under the Act, Steelco is plainly entitled to recover its attorney's fees [Section 76-10-1605(2)], and the limitations period under the Act unquestionably has not run [Section 76-10-1605(9)].

VI. STEELCO IS ENTITLED TO RECOVER UNDER THE RECEIVING STOLEN PROPERTY STATUTE

The trial court found that Steelco did not prove its claims under Utah Code Ann. §76-6-412(2) (the "Statute") because Wasatch Steel was not in a business of the sort contemplated by Section 76-6-408(2)(d), which is incorporated in the Statute. [Finding of Fact ¶63; R359.] The trial court found all elements to defendants' liability under the Statute, but erred in its legal interpretation of Section 76-6-408(2)(d).

Utah Code Ann. §76-6-412(2) provides:

> (2) Any person who has been injured by a violation of Subsection 76-6-408(1) may bring an action against any person mentioned in Subsection 76-6-408(2)(d) for three times the amount of actual damages, if any sustained by the plaintiff, costs of suit and reasonable attorney's fees.

Section 76-6-408(1) generally provides that a person commits theft if he receives or disposes of property knowing that it is stolen or believing that it has probably been stolen. The trial court found that Hurst and Wasatch Steel received multiple loads

of steel from Heaton knowing that it had been stolen and that Steelco was injured as a result. [Findings of Fact ¶¶13, 41; R338.] This element is satisfied.

The Statute only renders liable a "person mentioned in Subsection 76-6-408(2)(d)." The entirety of Section 76-6-408 is quoted below:

> (1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.
>
> (2) The knowledge or belief required for paragraph (1) is presumed in the case of an actor who:
>
> (a) Is found in possession or control of other property stolen on a separate occasion; or
>
> (b) Has received other stolen property within the year preceding the receiving offense charged; or
>
> (c) Being a dealer in property of the sort received, retained, or disposed, acquires it for a consideration which he knows is far below its reasonable value.
>
> (d) Is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee or representative of the pawnbroker or person who buys, receives or obtains property and fails to require the seller or person delivering the property to certify, in writing, that he has the legal rights to sell the property.

> If the value given for the property, exceeds $20 the pawnbroker or person shall also require the seller or person delivering the property to obtain a legible print, preferably the right thumb, at the bottom of the certificate next to his signature and at least one other positive form of identification.
>
> (i) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of the pawnbroker or person who fails to comply with the requirements of (d) shall be presumed to have bought, received or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.
>
> (ii) When in a prosecution under this section it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed or withheld the property without requiring the person from whom he bought, received, or obtained the property to sign the certificate required in paragraph (d) and in the event the transaction involves an amount exceeding $20 also place his legible print, preferably the right thumb, on the certificate, then the burden shall be upon the defendant to show that the property bought, received or obtained was not stolen.

Thus, apart from the trial court's finding that defendants knew the steel was stolen, the Statute provides that Wasatch Steel is presumed to have known or believed that the property was stolen or probably stolen if (a) it was in possession of property stolen on a separate occasion, as the court found in Finding No. 10

[76-6-408(2)(a)] or (b) it received stolen property within the year preceding the transaction in question, as the court found in Finding No. 10 [76-6-408(2)(b)] or (c) it acquired the material for consideration known to be far below its value, as the court found in Finding No. 14 [76-6-408(2)(c)] or (d), being in the used steel business, it received property from Volma Heaton and failed to require that he in writing certify as to his ownership of the property, as Mr. Hurst himself testified was the case [R450 at 68] [76-6-408(2)(d)].

The trial court, although finding each element to defendants' liability under the Statute, dismissed this claim on the ground that "[n]either Wasatch Steel Inc. nor Hurst is 'a pawnbroker or person who has or operates a business dealing in used or collecting used or second-hand merchandise or personal property, or an agent, employee or representative of the pawnbroker or person who buys, receives or obtains property' within the meaning of Utah Code Ann. §76-6-408(2)(d)." [Finding No. 63; R359]. The quoted language expressly includes pawnbrokers OR a person who deals in used or second-hand property. The trial court found, and the evidence was undisputed on this point, that "Wasatch Steel Inc. is in the business of purchasing and selling both new and used steel." [Finding No. 3; R335]. In this case itself, Wasatch Steel received on the order of 100 loads of used steel from Heaton. Wasatch Steel and Hurst are, according to the

court's findings, parties within the statutory definition of persons liable under the Statute.

Steelco is therefore entitled to judgment under the Statute against Hurst and Wasatch Steel, jointly and severally, in the amount of $271,051.93 shown on Exhibit 33-P, interest on the trebled principal amount thereof, and Steelco's attorney's fees, which the court found to be $35,850. Exhibit 33-P is merely a summary of the losses suffered by Steelco as a result of the thefts of its steel (the dollar amounts of which were specifically found by the trial court at paragraphs 17 and 30 of its Findings of Fact) which triples the damage amounts as prescribed by the Statute. These amounts should be substituted for the amount awarded under paragraph 1 of the Judgment relating to stolen steel. The Statute clearly allows Steelco to recover its attorney's fees [§76-6-412(2)], and there has been no limitations defense pleaded or argued with respect to Steelco's claims under the Statute.

CONCLUSION

Steelco seeks the following relief in this appeal and cross appeal:

First, Steelco requests that this Court affirm the trial court's Judgment in all respects other than its dismissal of Steelco's claims under the Racketeering Enterprises Act and receiving stolen property statute.

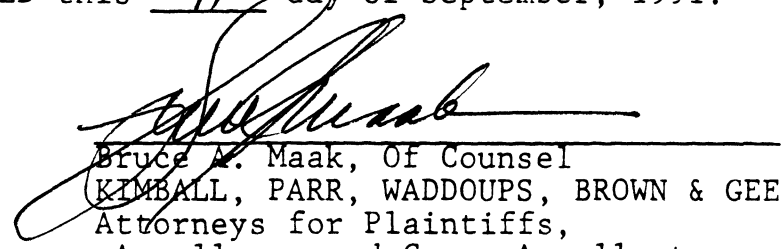
Second, Steelco requests that this Court award it judgment under the receiving stolen property statute in the trebled amount of $271,051.93, and interest, which amount should be substituted for the corresponding amount awarded by the trial court for the stolen steel loss in paragraph 1 of the Judgment.

Third, Steelco requests that this Court award it judgment under the Racketeering Enterprises Act in the doubled amount of $211,480.66, which amount should be substituted for the corresponding amounts awarded by the trial court for both stolen steel and kickback transactions in paragraphs 1 and 2 of the Judgment. If this Court grants relief under the receiving stolen property statute, the larger trebled amount thereof noted under the preceding paragraph ($271,051.93) should be added to double the amount of Steelco's kickback damages ($31,958.30 -- see Finding No. 61 for undoubled amount) to arrive at the amount of $303,010.23, which should be substituted for paragraphs 1 and 2 of the court's Judgment.

Fourth, Steelco requests that this case be remanded to the district court for a determination of the attorney's fees incurred on appeal by Steelco, the amount of which should be added to the attorney's fees awarded through trial by the trial court.

Fifth, Steelco requests an award of its costs on appeal.

RESPECTFULLY SUBMITTED this 11 day of September, 1991.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief of Appellees and Cross-Appellants was served this 11 day of September, 1991 by hand delivering on said date four (4) copies thereof to:

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